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# in the Supreme Court of the United States

**October Term, 1993**

MONROE COUNTY, FLORIDA,

*Petitioner,*

*vs.*

NEW PORT LARGO, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 1993

102 pp

## THE QUESTIONS PRESENTED FOR REVIEW

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IS THE EXHAUSTION OF ALL AVAILABLE STATE ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURES A NECESSARY REQUIREMENT FOR THE ACCRUAL OF A CLAIM FOR JUST COMPENSATION UNDER THE FIFTH AMENDMENT?

### II

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Monroe County, Florida respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 17, 1993.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993). The district court's opinion is unreported but is set forth in Appendix B at B-1. An earlier opinion of the district court dealing with related aspects of the case is reported as *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1988).

## JURISDICTION

The judgment of the Court of Appeals in this case was rendered on March 17, 1993, reversing the decision of the U.S. District Court for the Southern District of Florida which had entered summary judgment in favor of Petitioner Monroe County. The Court of Appeals thereafter denied a timely petition for rehearing and suggestion of rehearing en banc on May 20, 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISION, STATUTE AND ORDINANCE INVOLVED

This is a constitutional regulatory "takings" case, brought pursuant to the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution as made applicable to the states and their political subdivisions by the Due Process Clause of the Fourteenth Amendment.

The Fifth Amendment to the Constitution of the United States provides as follows:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The entire text of the Monroe County, Florida zoning ordinance entitled "Private Airport District" (Ord. No. 14-1979) is set out in Appendix E at E-1.

# STATEMENT OF THE CASE

## I

## THE FACTS

This case involves a challenge to a county zoning ordinance which changed the zoning of a parcel of land from residential to private airport, in keeping with the original and then-existing use of the land in question. The property consists of approximately 9.65 acres of oceanfront land located on Key Largo in Monroe County, Florida.

The land at issue had been purchased from the State of Florida in 1968. It was submerged at the time. The original purchaser filled in the land and added a runway. The property was continuously used as an airport from at least 1972 until 1985.

Because the land at issue had been reclaimed from the Atlantic Ocean, it had no zoning until 1972. In that year, it was zoned RU-2 residential. The RU-2 classification "is intended to provide residential areas in which duplexes may be constructed and occupied." Monroe County, Fla., *Code* art. IX, § 19-196 (1987). At the time, Monroe County had no zoning classification which applied to airports.

On June 5, 1979, the Monroe County Board of County Commissioners enacted a private airport district zoning ordinance. The purpose of the ordinance was "to provide a classification of property where the private airport may be established. The provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter." Monroe County, Fla., *Code* art. XIV, § 19-295(a) (1987).

The zoning of the property was accordingly changed by the Zoning Board of Monroe County from RU-2 residential to PA private airport on January 24, 1980. The decision of the Zoning Board was upheld by the Board of County Commissioners in an appeal by Respondent New Port Largo, Inc. on September 11, 1980.

The original purchaser had sold the property (together with a large amount of adjacent land) to Respondent New Port Largo, Inc. on September 1, 1979. New Port Largo filed suit in Florida Circuit Court on October 10, 1980, seeking to overturn the decisions of the Zoning Board and the Board of County Commissioners. The zoning of the property as PA private airport was invalidated by the state trial court on January 2, 1986. Neither side appealed.

Midway through the state court proceeding, New Port Largo sold all of the land at issue. The sale took place on September 9, 1982. While New Port Largo remained as a party to the state court case until its conclusion, the state trial judge was never advised that New Port Largo had divested itself of title to all of the property in dispute.

The airport property has now been fully developed into luxury homesites.

## II

## THE COURSE OF PROCEEDINGS

New Port Largo and its two shareholders filed their Complaint in this case on July 7, 1987. The jurisdiction of the district court was predicated on 28 U.S.C. §§ 1331 and 1343(a) for the federal claims presented and on the doctrine of pendent jurisdiction for the accompanying state law claims.

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Through a series of orders and stipulations among the parties (none of which are pertinent to the issues raised by this Petition), by June 14, 1989, the original three plaintiffs had been reduced to one; twenty-eight of the original twenty-nine defendants had been eliminated from the case; and the only two counts remaining in the Complaint were a 42 U.S.C. § 1983 claim and a Fifth Amendment claim for an uncompensated regulatory taking of the airport property. Both claims were based upon the actions of the Monroe County Zoning Board and the Monroe County Board of County Commissioners in zoning the airport property as PA private airport.

On July 17, 1989, Monroe County moved for summary judgment, based, in part, on an argument that the four-year statute of limitations applicable in Florida to federal civil rights claims had expired before the Complaint was filed.

On December 22, 1989, the district court entered summary judgment in favor of Monroe County and dismissed New Port Largo's remaining claims with prejudice. The district court held that New Port Largo's claims had accrued—and the statute of limitations had begun to run—on the date that New Port Largo had sold the property; i.e., on September 9, 1982. "On July 7, 1987, [New Port Largo] filed its complaint in this action. This filing occurred ten-months late."

New Port Largo filed a timely Notice of Appeal of the district court's order on January 17, 1990.

On March 17, 1993, the Court of Appeals issued its decision, vacating the district court's judgment and remanding the case for further proceedings. The Court of Appeals held that New Port Largo's "temporary regulatory takings claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property. [New Port Largo's] claims are not time-barred." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1495 (11th Cir. 1993). In making this determination, the Court of Appeals ruled that "takings claims can accrue, if ever, only *after* the state judiciary's final determination on the status of the subject property." *Id.*, 985 F.2d at 1494 (emphasis in original).

In reaching these results, the Court of Appeals believed itself to be bound by the earlier decision of *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (referred to throughout the opinions in this case as *Corn III*): "*Corn III* is this circuit's only decision addressing the accrual date of a just compensation claim, and we are bound by it." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1490 n.1 (11th Cir. 1993). "*Corn III*, therefore, is the law of the circuit and will remain the law unless the court, sitting en banc, corrects the standard which all judges of this panel believe to be erroneous." *Id.*, 985 F.2d at 1495 n.1 (Tjoflat, C.J., concurring).

The opinion of the Court of Appeals was accompanied by two special concurrences. Chief Judge Tjoflat wrote separately "to express my concern that Corn III's test for determining the accrual date of Fifth Amendment claims for just compensation directly conflicts with the Supreme Court's decision in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1495 (11th Cir. 1993) (Tjoflat, C.J., concurring). Judge Edmondson (the authoring Judge of *Corn III*) also specially concurred, noting that "[w]hat was decided in *Corn III* does need to be stripped of some obscuring and confusing dicta." *Id.*, 985 F.2d at 1499 (Edmondson, J., concurring).

Monroe County filed a timely Petition for Rehearing and Suggestion of Rehearing En Banc on April 7, 1993. Both were denied by the Court of Appeals on May 20, 1993.

## REASONS FOR GRANTING THE WRIT

### I

### THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE LAW IN OTHER CIRCUITS AND WITH APPLICABLE DECISIONS OF THIS COURT

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court articulated two prerequisites for the accrual of a claim under the Just Compensation Clause. First, such a claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116.

Second, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121.

The Eleventh Circuit has held in this case, in harmony with an earlier decision by the same Court, that the first prong of the *Williamson* test—the final decision requirement—can only be met by the exhaustion of all available means of state administrative and judicial review of a challenged regulation. In doing so, the Eleventh Circuit has aligned itself on this subject with the Ninth. *See Norco Construction, Inc. v. King County*, 801 F.2d

1143, 1145 (9th Cir. 1986) ("under federal law the general rule is that claims for inverse taking. . .are not matured claims until planning authorities *and state review entities* make a final determination on the status of the property.") (emphasis added).

Both the Ninth Circuit and the Eleventh Circuit appear to have confused *Williamson's* requirement of a final decision by the initial government decisionmaker with its separate and distinct command that a property owner must first resort to available state mechanisms (including judicial remedies) for obtaining just compensation before a federal takings claim accrues or may be filed. Both Circuits have thus expanded *Williamson's* final decision requirement in a manner which cannot reasonably be inferred from the text of the decision itself: "The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. . . . Exhaustion of review procedures is not required." *Williamson*, 473 U.S. at 192, 194 n.13, 105 S.Ct. at 3119, 3120 n.13.

In their interpretation of *Williamson*, the Ninth and Eleventh Circuits are in conflict with decisions of the First, Seventh and Tenth Circuits. *See Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) ("It is apodictic that, where a state law or municipal ordinance contains provisions for administrative relief, an as-applied claim can only arise when a property owner has actually sought, and been denied, a permit."); *Biddison v. City of Chicago*, 921 F.2d 724, 727 n.3 (7th Cir.) *cert. denied*, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991) ("The developer was not required to employ administrative or judicial procedures that are 'remedial' in nature (*i.e.*, seeking review of the adverse decision). . ."); *Landmark Land Company v. Buchanan*, 874 F.2d 717, 720 (10th Cir. 1989) ("A 'final decision' requires. . .a definitive action by local authorities indicating with some specificity what level of development will be permitted. . .").

In order to resolve the existing conflict among the Circuits and to reconcile the decision in this case with this Court's decision in *Williamson*, a writ of certiorari should issue to review the judgment and opinion below.

## II

## THE AVAILABILITY OF JUST COMPENSATION TO A PROPERTY OWNER WHO HAS SOLD THE REGULATED PROPERTY BEFORE ISSUANCE OF A FINAL DEVELOPMENT DECISION IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT

As earlier noted, Respondent New Port Largo sold all of the land at issue in this case more than three years before the state trial court invalidated the land's PA private airport zoning. In terms of the impact of that event upon the ultimate validity of New Port Largo's claim for just compensation, the Court of Appeals held that New Port Largo's "*injury* may have ended when it sold the property, but, under *Corn III*, [New Port Largo's] *claims* did not accrue until the state proceedings had concluded." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1494 (11th Cir. 1993) (emphases in original).

The Court thus apparently created a rule of law that a claim for just compensation cannot ripen (and the applicable statute of limitations does not begin to run) until a final development decision is obtained in all instances, even when such a decision is made long after the original property owner has given up all interest in the property in question.

There are two serious difficulties with this rule. First, the sale of unconstitutionally regulated property may itself disable the original owner from ever obtaining a final development decision and may therefore forever prevent the accrual of his or her legitimate claims for just compensation. In most instances, a *former* property owner would lack standing to seek a definitive decision from the initial government decisionmaker delineating the precise contours of permitted development of land he no longer owns.

Any subsequent owner of the burdened property would be disinclined to perform this function as well, since, having taken the property subject to the regulation (and presumably at a discount reflecting the value of the property as regulated), the new owner could not present a viable claim for just compensation. As a consequence, the unyielding application of *Williamson's* final decision requirement to regulated property that has been sold serves to punish those property owners who are unable to persevere throughout the regulatory process and to discourage the return of unfairly regulated property to full economic utility.

The problem is not merely theoretical. The plaintiff in *Williamson* spent eight years attempting to obtain a final decision only to have this Court find that it had still not succeeded in that effort. Fact patterns involving the sale of property prior to the issuance of a final development decision should become more frequent throughout the federal court system now that entitlement to just compensation for a temporary taking is firmly established. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

The second difficulty with the application of *Williamson's* final decision requirement to the accrual of claims by former property owners (particularly as interpreted by the Court of Appeals in this case) is the converse of the first: potential claims for just compensation become open-ended, lasting, conceivably, in perpetuity.

If a former owner of regulated property can satisfy the final decision requirement by means of a final development decision obtained by a subsequent owner—as the decision of the Court of Appeals in this case suggests—his claims for just compensation will come to life at that point. If the applicable statute of limitations does not begin to run until that date, however, the former property owner could then institute a claim for just compensation based upon an allegedly confiscatory regulation that was enacted perhaps decades earlier.

What this may mean in practical application is that every local regulatory body will become vulnerable to stale constitutional takings claims whenever the scope of permitted property development is clarified by regulatory enactment.

The Court of Appeals in this case noted that "[t]he Supreme Court never has addressed directly the effect of the sale of property on the accrual date of a takings claim." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1494 n.14 (11th Cir. 1993) (citation omitted). A writ of certiorari should issue so that this Court may examine and decide upon the important interrelationships between the ripening of a claim for just compensation and the operation of the statute of limitations applicable to such claims in the context of a transfer of ownership of property subject to regulation.

## CONCLUSION

Petitioner Monroe County, Florida respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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# Appendix A

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*New Port Largo, Inc. v. Monroe County,*
985 F.2d 1488 (11th Cir. 1993)

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United States Court of Appeals,
Eleventh Circuit.

March 17, 1993.

**Nos. 90-5091, 90-5327**

NEW PORT LARGO, INC., a Florida corporation, Charles H. Netter and Stuart D. Marr, *Plaintiffs-Appellants,*

New Port Largo, etc., *Plaintiff,*

*v.*

MONROE COUNTY, a political subdivision of the State of Florida, Kenneth Sorensen, Board Member of County Commissioners, Monroe Planning & Zoning, Donald Schloesser, Commissioners Board, Alison Fahrer, Commissioners Board, Curt Blair, Commissioners Board, and George Dolezal, Commissioners Board, *Defendants-Appellees,*

Wilhelmenia Harvey, et al., *Defendants.*

NEW PORT LARGO, INC., Charles H. Netter and Stuart D. Marr, *Plaintiffs-Appellees,*

New Port Largo, etc., *Plaintiffs,*

*v.*

MONROE COUNTY, a political sub-division of the State of Elorida, *Defendant-Appellant,*

Kenneth Sorensen, etc., et al.,
*Defendants.*

Coffey, Aragon, Martin, Burlington & Serota, P.A., Miami, FL, Jeffrey B. Crockett, Maurice J. Kutner, Michael R. Seward, Law Office of Michael R. Seward, Miami, FL, for plaintiffs-appellants in No. 90-5091.

Alan G. Greer, Floyd, Pearson, Richman, Greer, Weil, Zack & Brumbaugh, P.A., Miami, FL, for Monroe Cty., Fahrer, Sorenson, Blair, Dolenzal & Schloesser.

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Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

The principal issue presented by these consolidated appeals is whether the district court erred in granting appellee's motion for summary judgment by applying the wrong tolling doctrine to appellant New Port Largo, Inc.'s (NPL) temporary regulatory takings claims, thereby holding the claims barred by the applicable statute of limitations. NPL sold the subject property two years after the enactment of the allegedly infringing regulation. The district court, observing that the regulation could cause NPL no injury thereafter, held that the applicable statute of limitations ran from the date NPL sold the property. NPL contends that the statute of limitations was tolled until the state court, in passing on the validity of the regulation, declared the regulation invalid. Based on *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) *(Corn III)*,[1] we conclude that the district court erred. Accordingly, we vacate the district court's judgment and remand the case for further proceedings.[2]

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[1] Issues resolved by prior panels of this court are binding on subsequent panels. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). *Corn III* is this circuit's only decision addressing the accrual date of a just compensation claim, and we are bound by it.

[2] On cross-appeal, the County claims that the district court abused its discretion in denying its claim for attorneys' fees under 42 U.S.C. § 1988. The County's proffered support found in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694, 700-01, 54 L.Ed.2d 648 (1978), however, is its own undoing. The County concedes that for a party to receive attorneys' fees under section 1988 it must be the prevailing party and, further, the nonprevailing party's claim must be "frivolous, unreasonable, or without foundation . . ." *Id.* at 421, 98 S.Ct. at 700. Given that we remand this case, it is obvious that the County has not satisfied either requirement.

Should we hold today that NPL's takings claims are not time-barred, both parties ask this court to decide NPL's takings claims, which were not reached below, and a host of related issues necessary to resolve those claims. These issues run the gamut from deciding whether there was a "taking" in this case to whether the subsequent purchasers properly assigned their takings claims to NPL on July 24, 1989, and, if so, whether the statute of limitations has run on those claims. Although a final judgment has been entered, and it is therefore permissible for this court to address the merits of the takings issue on appeal, we note that the pretrial stipulation, "Statement of Issues of Fact Which Remain to Be Litigated" ¶24, identifies the takings issue as a question of fact. We decline the parties' invitation to decide these factual issues. By remanding, we leave these issues to the district court.

## I.

### A.

In August 1968, the State of Florida sold a parcel of submerged land located on Key Largo's Atlantic coast to a private trust.[3] In December 1972, after the private trust filled in and prepared the land for residential construction, the Monroe County Planning and Zoning Department (the Zoning Department) zoned the property for residential duplex use (RU-2).

In September 1979, NPL purchased the property from the private trust. In November 1979, appellee Monroe County (the County) filed an application with the Zoning Department to rezone the property from RU-2 to private airport use (PA). On January 24, 1980, the Zoning Department held a hearing on the proposed rezoning and subsequently approved the County's application. NPL appealed the Zoning Department's decision to the Monroe County Board of Commissioners (the Commission). On September 11, 1980, the Commission affirmed the Zoning Department's decision.

On October 10, 1980, NPL filed a petition for a writ of certiorari in state circuit court alleging that the rezoning violated Florida law. NPL claimed that the County had not complied with the procedural requirements of its Major Development Project Ordinance, an ordinance that applies to rezonings which, as here, concern parcels of land greater than five acres. On September 9, 1982, during the pendency of its certiorari petition, NPL sold the property in question, conveying one-half undivided interests in fee simple both to TFW, Inc., a Florida corporation, and to a land trust administered by the First National Bank of South Miami. Neither of these purchasers intervened in the certiorari proceeding brought by NPL. In August 1985, NPL amended its petition to include a claim that the County had deprived NPL of its property "without offering compensation . . . in violation of the constitutions and laws of the United States and of the State of Florida." NPL also claimed that the rezoning did not comply with the dimensional requirements and safety regulations for a private airport. NPL asked the court to declare the rezoning invalid, to return the property to its RU-2 zone classification, and to provide any further relief the court deemed appropriate.

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[3] The brief statement of the facts in the text presents only those facts pertinent to the issues presented on appeal. A full recitation of the parties' interaction is contained in the district court's November 21, 1988 opinion. *See New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D.Fla. 1988).

On January 2, 1986, the state court granted NPL's petition to invalidate the rezoning ordinance. The court found that the County's rezoning of the property to PA violated the dimensional requirements of a private airport zone, the County had not complied with the procedures of its Major Development Project Ordinance, and the rezoning "would deprive [NPL] of any reasonable use" of its property. Accordingly, the court declared invalid and quashed the County's rezoning of the subject property. Because the court found that the County had acted in good faith in pursuing the rezoning, however, it did not award damages to NPL.[4] Neither party sought appellate review of the court's decision.

## B.

On July 7, 1987, NPL brought this action in the United States District Court for the Southern District of Florida, seeking, among other forms of relief, just compensation for the alleged temporary regulatory "taking" of its property[5] both under 42 U.S.C. § 1983 (1988), and directly under the Fifth Amendment as made applicable to the states by the Fourteenth Amendment.[6] NPL alleged that the taking

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[4] *See Corn III*, 904 F.2d at 586-87 ("we note[] that Florida courts recognize[] no money-damage claims for 'good faith, albeit confiscatory, zoning activities' ") (quoting *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1519 (11th Cir. 1987) (*Corn II*) ).

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[5] In *First English Evangelical Lutheran Church v. City of Los Angeles*, the Supreme Court held that the invalidation of a zoning ordinance, "through converting the [regulatory] taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause," 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987), and held that "no subsequent action of the government can relieve it of the duty to provide compensation for the period during which the taking was effective," *id.* at 321, 107 S.Ct. at 2389.

[6] We distill from NPL's artless pleadings, drawn in "shotgun" fashion, a Fifth Amendment claim asserted through the Fourteenth Amendment's Due Process Clause.

As the court read it, NPL's complaint sought relief in eleven separate counts against twenty-nine defendants.

> The first three counts are for violations of the Federal Civil Rights Acts, with Count I alleging a violation of 42 U.S.C. § 1983, Count II alleging a violation of 42 U.S.C. § 1985, and Count III alleging a violation of 42 U.S.C. § 1986. The remaining counts are pendant[sic] state law claims, with Count IV alleging an unjust taking, Count V asserting an abuse of process claim, Count VI a malicious prosecution claim, Count VII a disparagement of title claim, Count VIII a tortious interference claim, Count IX an intentional infliction of emotional stress[sic] claim, Count X a negligent infliction of emotional stress[sic] claim, and Count XI a broad-based conspiracy claim.

*New Port Largo*, 706 F.Supp. at 1511. Through a joint stipulation of the parties, *see id.* at 1511 n.2, and the district court's order of November 21, 1988, *id.* at 1524-25, all claims, except for count I as to the defendant Monroe County, were dismissed. The district court, however, granted NPL leave to amend counts IV, VII, IX, X and XI. *Id.* at 1525. NPL only amended count IV, restating its claim under the Fifth Amendment's Takings Clause. Additional voluntary and court-ordered dismissals left only one plaintiff, NPL, one defendant, Monroe County, and two counts, count I, the 42 U.S.C. § 1983 claim, and count IV, as amended, the

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occurred when the County rezoned the property to a PA zone classification. The County filed a motion to dismiss all counts of the complaint asserting that NPL's takings claims were barred by res judicata and by the statute of limitations. *See New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507, 1511 (S.D.Fla. 1988).

On November 21, 1988, the district court found that the state court had not rendered a final adjudication on NPL's takings claims, and therefore rejected the County's res judicata defense. *Id.* at 1512-13 & n.3; *see Corn III,* 904 F.2d at 587 (res judicata defense based on state petition attacking the validity of ordinances did not preclude later claim for just compensation). In considering the County's statute of limitations argument, the district court reasoned that all just compensation claims should be treated similarly, regardless of whether the claims allege a complete taking or a temporary regulatory taking. *New Port Largo*, 706 F.Supp. at 1516-17. The court opined that in all actions to rectify the government's taking of private property, the applicable "statute of limitations runs from the time of [the government's] appropriation." *Id.* at 1516. The court suggested that the statute of limitations can be tolled only if the government continues to violate the law by new acts of appropriation.[7] *Id.* at 1517.

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federal takings claim. These appeals, brought pursuant to 28 U.S.C. § 1291 (1988), address only the dismissal on December 22, 1989, of the two remaining claims as time-barred, *see infra* part II, and the district court's denial of Monroe County's motion for an award of attorney's fees pursuant to 42 U.S.C § 1988 (1988), *see supra* note 1.

[7] The district court termed this tolling doctrine the "continuing wrong" doctrine, *New Port Largo*, 706 F. Supp. at 1515, and stated:

> [t]his court holds that the focus of the continuing wrong doctrine should be on the defendants' purported wrongful activities, and not upon the plaintiffs' alleged suffering. Accordingly, if the defendants' activities constitute a continuing

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Utilizing this "continuing wrong" tolling doctrine, the court initially held that the last act of appropriation by the County occurred on April 9, 1985, when the state district court of appeal finally quieted title to the subject property in NPL.[8] *Id.* at 1518. After holding that the applicable statute of limitations in takings actions runs for four years,[9] here until April 9, 1989, the district court found

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> or additional violation of the law, then the doctrine applies; however, if the defendants' activities do not constitute a continuing violation, then the doctrine does not apply, irrespective of the fact that the plaintiffs' harm from the defendant['] initial violation may continue.

*Id.* at 1516.

[8] *Monroe County v. New Port Largo, Inc.*, 467 So.2d 757 (Fla. Dist. Ct. App. 1985).

[9] In finding that NPL's takings claims have a four-year statute of limitations, the district court applied *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). *See New Port Largo*, 706 F.Supp. at 1514. In *Wilson*, the Supreme Court first enunciated the doctrine that requires federal district courts to apply the most appropriate or most analogous state statute of limitations to actions under 42 U.S.C. § 1983. *Wilson*, 471, U.S. at 266-68, 105 S.Ct. at 1942-43. The court held that the most analogous state statute of limitations was the limitations period for personal injury. *Id.* at 276, 105 S.Ct. at 1947. *But see Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 n.1 (11th Cir. 1992), which cites *Reed v. United Transportation Union*, 488 U.S. 319, 323-24, 109 S.Ct. 621, 624-25, 102 L.Ed.2d 665 (1989), as recognizing a narrow exception to *Wilson* when a "more closely analogous federal statute of limitations exists that would better serve the federal policy interests involved."

Subsequently, the Supreme Court applied the same analysis to 42 U.S.C. § 1981 actions. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62, 107 S.Ct. 2617, 2620-21, 96 L.Ed.2d 572 (1987). The circuits soon followed suit and applied this approach to takings claims brought directly under the Constitution, *see, e.g., Bieneman v. City of Chicago*, 864 F.2d 463, 467-70 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989), and to tort actions brought directly under the Fourth Amendment (*Bivens* actions), *see, e.g., Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *McSurely v. Hutchison*, 823 F.2d 1002,

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that NPL's filing of its takings claims on July 7, 1987, fell well within the statutory period. *Id.*

On July 17, 1989, the County filed a motion for summary judgment seeking reconsideration of the court's determination that the last act of appropriation occurred on April 9, 1985, and arguing anew that NPL's regulatory takings claims were barred by the statute of limitations. Utilizing the district court's tolling doctrine, the County contended that NPL's sale of the subject property on September 9, 1982, precluded any tolling of the statute of limitations beyond that date by additional wrongful acts of appropriation by the County. As viewed by the County, NPL's action accrued on September 9, 1982, and the appropriate statute of limitations for NPL's action ran out four years later, on September 9, 1986, almost a year prior to the filing of NPL's claims in district court on July 7, 1987. The county concluded that NPL's claims were time-barred. The district court, adopting the County's argument, granted the County's motion for summary judgment on December 22, 1989.[10] NPL appealed,

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1005-06 (6th Cir. 1987), *cert. denied*, 485 U.S. 934, 108 S.Ct. 1107, 99 L.Ed.2d 269 (1988). *But cf. Gibson v. United States*, 781 F.2d 1334, 1342, n. 5 (9th Cir. 1986), *cert. denied* 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed. 979 (1987).

Although Florida has no personal injury statute of limitations *per se*, the district court held that the four year limitations period found in Fla. Stat. § 95.11(3)(a) (negligence), (o) (intentional tort), and (p) ("[a]ny action not specifically provided for in these statutes") (1989 & Supp. 1990), was the most appropriate to apply to NPL's takings claims because these actions were the most analogous state actions to a claim for personal injury. *New Port Largo*, 706 F. Supp. at 1514-15.

[10] The court stated:

> NPL's claims against Monroe County for harm NPL suffered[sic] while it owned the property began to run on September 9, 1982 under the applicable statute of limitations.

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No. 90-5091, and the County cross-appealed the district court's denial of attorneys' fees, No. 90-5327.

## II.

### A.

Our review of the applicable statute of limitations doctrine is a question of law subject to de novo review. *Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 857 (11th Cir. 1986). The determination of the accrual date of a federal regulatory takings claim depends on the occurrence of two events. First, state judicial authorities must make a final determination on the status of the subject property affected by the zoning ordinance. *Corn III*, 904 F.2d at 588 (holding that a regulatory takings claim is not mature until a state appellate court affirmed issuance of mandamus invalidating zoning ordinance); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (finding that a just compensation claim matures only after "planning authorities and state review entities make a final determination on the status of the property"). *But cf. Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93, 105 S.Ct. 3108, 3119-20, 87 L.Ed.2d 126 (1985) (holding that a takings claim ripens after final determination by the initial decisionmaker). Second, the property owner must be denied an adequate postdeprivation remedy. *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121. For statute of limitations purposes, both events are necessary for the accrual of a property owner's takings claim.

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NPL had four years within which to file its claims based on the harm done to it while it held the property—until September 9, 1986. On July 7, 1987, NPL filed its complaint in this action. This filing occurred ten months late. NPL's claims are time-barred.

First, if NPL had remained the owner of the subject property, then its takings claims could not have accrued for purposes of the statute of limitations until the state judicial authorities had made a final determination on the status of the property. *See Corn III*, 904 F.2d at 588. In the instant case, the state circuit court entered a final judgment on January 2, 1986, invalidating the County's rezoning of the property. The parties did not appeal. The state circuit court's judgment, therefore, was the state's final determination on the status of the subject property. *See id.*

Second, NPL must show that the state denied it adequate procedures through which NPL could seek compensation for the alleged taking. "[T]he State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Williamson*, 473 U.S. at 195, S.Ct. at 3121 (quoting *Hudson v. Palmer*, 465 U.S. 517, 532 n.12, 104 S.Ct. 3194, 3203 n. 12, 82 L.Ed.2d 393 (1984) ). At the time of the state circuit court's final judgment,[11] Florida courts did not recognize damages claims arising from regulatory takings. *See Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213, 216 (Fla. 1984).[12] Florida law, therefore, provided no postdeprivation remedy for NPL's claimed deprivations.

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[11] *Williamson* stated that the Just Compensation Clause of the Fifth Amendment only requires "that a reasonable, certain and adequate provision for obtaining compensation exist *at the time of the taking*." 473 U.S. at 194, 105 S.Ct. at 3120 (references and internal quotations omitted) (emphasis added); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S.Ct. 2862, 2879-80, 81 L.Ed.2d 815 (1984).

[12] Eleventh Circuit panels disagree as to whether Florida now recognizes a cause of action for damages wrought by regulatory takings. *Compare Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370 (11th Cir. 1989) (no cause of action), *cert. denied*, 493 U.S. 1079, 110 S.Ct. 1132, 107 L.Ed.2d 1038 (1990), *A.A. Profiles, Inc. v. City*

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Assuming NPL's continuous and uninterrupted ownership of the land, NPL's claims would have accrued on January 2, 1986, the date of the final judgment. At that time, both events required by *Williamson* to establish accrual of the takings claims had occurred. Applying *Corn III*, no matter which statute of limitations period urged by the parties governs the claims, NPL timely filed its takings claims in district court on July 7, 1987.[13]

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*of Ft. Lauderdale*, 850 F.2d 1483, 1486-88 & n. 3 (11th Cir. 1988) (same), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1743, 104 L.Ed.2d 180 (1989), and *Corn II*, 816 F.2d at 1520 (same) *with Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1542 (11th Cir.) (citing *Joint Ventures, Inc. v. Department of Transp.*, 563 So.2d 622, 622 (Fla. 1990), as recognizing inverse condemnation action), *cert. denied* ___ *U.S.* ___, *112 S.Ct. 55, 116 L.Ed.2d 32 (1991); see also Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477, 1481-83 (N.D.Fla.) (recognizing *Corn II*, but following *Executive 100*); *Barima Inv. Co. v. United States*, 771 F.Supp. 1187, 1189 (S.D.Fla., 1991), *aff'd*, 959 F.2d 972 (11th Cir. 1992).

> Similarly, Florida District Courts of Appeal have not settled on a single rule. *Compare Monroe County v. Gonzalez*, 593 So.2d 1143, 1145 (Fla.Dist.Ct.App. 1992) (finding inverse condemnation remedy), *Orlando/Orange County Expressway Auth. v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So.2d 790 (Fla.Dist.Ct.App.) (axiomatic that inverse condemnation exists under United States Constitution), *review denied*, 591 So.2d 183 (1991) and *Glisson v. Alachua County*, 558 So.2d 1030, 1035 (Fla.Dist.Ct.App.) *review denied*, 570 So.2d 1304 (Fla. 1990) *with Lee County v. Morales*, 557 So.2d 652, 656 (Fla.Dist.Ct.App.), (without reference to *First English*, applied *National Bulk Carriers* to reject inverse condemnation claim), *review denied*, 564 So.2d 1086 (Fla. 1990).

[13] On appeal, NPL asks us to apply a seven year statute of limitations to its takings claims, arguing that a claim for the taking of property is most analogous to a state claim for adverse possession. *See* Fla. Stat. § 95.12 (real property actions). Because we find that NPL's action was tolled until the state circuit court's final judgment was entered on January 2, 1986, the action was timely under either appellant's proposed statute of limitations or appellee's adoption of the district court's approach. *See supra* note 9 and accompanying test.

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We do not hold that the sale of the property in this case has no relevance to NPL's takings claims. The sale may prove relevant to a determination of the amount of compensation that would be "just" if NPL does establish that it is entitled to compensation for the taking of its property. Rather, we hold today that the state's invalidation of the zoning ordinance, not NPL's sale of the property, determines of the accrual date of NPL's action.

## III.

For the foregoing reasons, we find that NPL's temporary regulatory takings claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property. NPL's claims are not time-barred. Accordingly, we vacate the district court's judgment and remand this case for further proceedings.

VACATED and REMANDED.

TJOFLAT, Chief Judge, specially concurring:

Because we are bound to follow circuit precedent as established by *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (*Corn III*), I concur in the judgment of the court.[1] I write separately to express my concern that

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[1] Under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), a prior panel's holdings can only be overruled by the court sitting *en banc*. Judge Edmondson, in his special concurrence, argues that because application of what he considers to be the "correct" standard to *Corn III*'s facts would require the same result as was reached in that case, the rationale applied in *Corn III* is merely *obiter dictum*. It seems odd, however, that when an earlier decision incorrectly states a proposition, the determination of whether that proposition constitutes binding precedent depends on (1) the fortuity of the actual facts in the earlier case as applied to the panel's "correct" standard,

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*Corn III*'s test for determining the accrual date of Fifth Amendment claims for just compensation directly conflicts with the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

## A.

*Williamson* held that two determinative events govern the ripeness of a just compensation claim: (1) when the decisionmaker "charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," 473 U.S. at 186, 105 S.Ct. at 3116,[2] and (2) when "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining

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(2) whether those facts are available (so that the "correct" standard can be applied to the earlier case), and (3) the "correct" standard ultimately chosen by a subsequent panel. With Judge Edmondson's approach, a panel would have a fair chance of being able to ignore, as dictum, propositions with which it disagrees. I cannot believe that such an approach can do justice to the values furthered by the doctrine of *stare decisis* as expressed in *Bonner*. I agree with Judge Edmondson that the facts of a case define the controversy to be resolved by the court. I disagree, however, that once these facts are presented, and a standard of law applied to them, a subsequent panel can ignore application of a takings cause of action for statute of limitations purposes. *Corn III*, therefore, is the law of the circuit and will remain the law unless the court, sitting en banc, corrects the standard which all judges of this panel believe to be erroneous.

[2] A "final decision" is reached only after the property owner seeks available variances and permits. *Cf. Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1516 (11th Cir. 1987) (*Corn II*) ("Since the subject ordinances called for a complete moratorium on [development of the property], any request for a variance would plainly have been futile.").

such compensation,"[3] *id.* at 195, 105 S.Ct. at 3121 (citing *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31, 106 S.Ct. 662, 664, 88 L.Ed.2d 662 (1986);[4] *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-50, 106 S.Ct.

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[3] If the state clearly provides no procedure for seeking compensation, however, the plaintiff need not repair initially to state court in order to satisfy the denial element. *Eide v. Sarasota County*, 908 F.2d 716, 720 (11th Cir. 1990) (denial occurs when "there is no provision to award [the property owner] just compensation"), *cert. denied*,—U.S.—, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991).

[4] The *Williamson* Court relied on an analogy to *Parratt* to support its conclusion that a federal taking can occur only if "the State fails to provide an adequate postdeprivation remedy for the property loss." *See Williamson*, 473 U.S. at 195 & n. 14, 105 S.Ct. at 3121 & n. 14. The *Parratt* analogy suggests that upon return to the federal forum, after exhaustion of the state procedures providing for compensation, the plaintiff can challenge the adequacy of those procedures, but cannot relitigate the merits of the just compensation claim. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728-29 (3rd Cir. 1989) (interpreting *Williamson*, Fifth Amendment only requires fair procedures); *Culebras Enters. v. Rios*, 813 F.2d 506, 516 (1st Cir. 1987) (the state need only afford "a reasonable, certain and adequate procedure for obtaining compensation"); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 849 F.2d 1412, 1414-15 (11th Cir. 1988) (collateral estoppel barred relitigation of just compensation claim). *But cf. Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1307-08 (11th Cir. 1992) (applying res judicata, resolution of state court procedure precluded subsequent 42 U.S.C. § 1983 action based on the Just Compensation clause; stated possible exception to res judicata).

Upon return toe the federal forum, the plaintiff first challenges the adequacy of the state procedure providing the compensation. If the court determines that such procedure is adequate, the litigation ends. If the court finds that the state procedure is inadequate, however, the court then litigates the merits of the just compensation claim. That is, the court determines whether a taking has occurred, and if so, awards just compensation. As a practical matter, *Williamson* precludes litigation of the merits of a just compensation claim in federal court unless the state declines to provide adequate procedures through which an aggrieved party might seek compensation.

2561, 2565-66, 91 L.Ed.2d 285 (1986).[5] I am concerned only with *Corn III*'s mistreatment of *Williamson*'s first "final decision" requirement.

By requiring a final decision by the initial decisionmaker, *Williamson* simply recognized that the decisionmaker's definitive position on the status of the property establishes both the occurrence and magnitude of the "interfer[ence] with [the property owner's] reasonable investment-backed expectations." *Williamson*, 473 U.S. at 191, 105 S.Ct. at 3119 (citing *Penn Central Transp. Co. v. New York City.*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978)). In *MacDonald, Sommer & Frates.*, the Court reviewed its prior decisions in *Williamson, Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (finding takings claim ripe where an application for improvement not sought), and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (lacking jurisdiction where judgment not final), and concluded that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 349-52, 106 S.Ct. at 2566-67. *MacDonald* emphasized that courts need sufficient information concerning the degree of infringement as a prerequisite to deciding whether compensation is due. *Id.* at 348-49, 106 S.Ct. at 2566. Indeed, *MacDonald* established that a constitutional injury does not occur until the relevant decisionmaker renders its final determination on "the type and intensity of development legally permitted on the subject property." *Id.* at 348, 106 S.Ct. at 2566.

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[5] The *Williamson* court also seems to have been influenced by abstention concerns: "If [the property owners] were to seek [variances], a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Williamson*, 473 U.S. at 187, 105 S.Ct. at 3117; *cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1046 (11th Cir. 1982).

## B.

*Corn III* recognized that a federal claim accrues when the plaintiff knows or has reason to know of the injury that provides the basis of the action, and that a constitutional injury occurs at the same time that the takings claim ripens. 904 F.2d at 588 (citing *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986); *see also Biddison v. City of Chicago*, 921 F.2d 724, 728 & n. 5 (7th Cir. 1991) (just compensation claim accrues when it ripens); *Norco*, 801 F.2d at 1146 (rejecting date ordinance passed as accrual date, and stating "the same considerations that render a [42 U.S.C § 1983] claim premature prevent accrual of a claim for limitations purposes"); *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1457 (9th Cir. 1986), (accrual occurs when claim ripe under *Williamson*, not when a property owner's rights are interrupted by the regulation), *cert. denied*, 480 U.S. 906, 107 S.Ct. 1348, 94 L.Ed.2d 519 (1987); *cf. Agins*, 447 U.S. at 260 100 S.Ct. at 2141 (mere enactment of ordinance does not constitute taking). When *Williamson*'s two-prong test is met, the injury is complete, and the claim accrues for purposes of the statute of limitations.[6] Thus, if a state does not provide adequate procedures through which a property owner may obtain just compensation, the infringement ripens into a constitutional injury when the initial decisionmaker reaches a final determination.

The *Corn III* court erred by improperly expanding *Williamson*'s final decision requirement so that accrual is postponed until "state review entities"—rather then(sic) the initial decisionmakers—"have made a final determination on the status of the subject property." *Corn III*, 904 F.2d at 588 (quoting *Norco*, 801 F.2d at 1145). Hence, under *Williamson*, a federal takings claim ripens as soon as the initial decisionmaker renders a final decision. In contrast, under *Corn III*, a federal takings claim ripens only after the property owner has exhausted all legal means of challenging the ordinance, which in both the instant case and *Corn III* represented litigation that did not address the takings question but instead might have clarified the damages resulting from the taking. *Corn III's* exhaustion requirement thus postpones the availability of a federal forum for a property owner's just compensation claims that are ripe under *Williamson*. *Corn III* provides, and I intuit, no rational explanation for this extension of *Williamson*.[7]

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[6] The continuing wrong doctrine may, as the district court believed, postpone accrual. *See ante* at 1491-93.

In discussing the preclusive effects of a prior state mandamus proceeding on the plaintiff's just compensation claim, *Corn III* presented its expanded finality requirement outside of the statute of limitations context:

> [u]nder both state and federal law, the taking claim is supplemental to the state proceeding on the propriety of the zoning regulation and is not mature until the propriety or impropriety of the zoning regulation has been finally determined. *See, e.g., MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (damage action not available until court decides separately filed mandamus

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[7] The Ninth Circuit's *Norco* decision, from which *Corn III* adopted its expanded *Williamson* test, also provides no explanation. *See generally Norco*, 801 F.2d at 1145-56.

> action and gives county an opportunity to provide adequate compensation).[8]

*Corn III*, 904 F.2d at 587. This language suggests that *Corn III* simply confused exhaustion of state procedures for obtaining compensation (which *Williamson* requires) with exhaustion of judicial and administrative review of the regulation itself (which *Williamson* does not require). Indeed, *Williamson* specifically rejected the notion that plaintiffs must exhaust state review procedures before their takings claims ripen.

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable . . . While the policies underlying the two concepts often overlap, the finality requirements is concerned with whether the *initial decision maker* has arrived at a definitive position on the issue *that inflicts an actual, concrete injury*; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain

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[8] The *Corn III* court incorrectly relied on *MacDonald* for the proposition that a federal cause of action is not available until after the state court determines the status of the property. In *MacDonald*, a separate mandamus action was pending in state court. Both the *MacDonald* majority and dissent, however, concentrated on whether the initial decisionmaker—rather than the state's judiciary—had reached a definitive position on the status of the property. *See MacDonald*, 477 U.S., at 353 n.8, 106 S.Ct. at 2568 n. 8 ("The implication is not that future applications [for permits] would be futile, but that a meaningful application has not yet been made."); *id.* at 358, 105 S.Ct. at 2571 (White, J., dissenting) ("considered for takings purposes only the actual regulatory decision that had been made by the governmental decisionmaker").

> a remedy if the decision is found to be unlawful or otherwise inappropriate.

*Williamson*, 473 U.S. at 192-93, 105 S.Ct. at 3119-20 (citations omitted) (emphasis added); *see also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 n. 8 (11th Cir. 1989); *cf. East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264, 1266 (11th Cir. 1989). Resort to state review procedures may provide a remedy, including invalidation of the regulation, and, therefore, may change the amount of just compensation claimed by the property owner. The resolution of state review procedures, however, will not alter that fact that a taking, and thus a constitutional injury, may have occurred. Nevertheless, *Corn III* requires property owners to engage in protracted, and possibly futile, litigation in state courts before the property owners can repair to federal court to vindicate their federal right to just compensation. With no redeeming quality to support *Corn III*'s approach, I believe *Corn III* improperly expanded *Williamson*'s final decision requirement for purposes of determining the accrual date of a just compensation claim.

### C.

Because the state did not provide New Port Largo (NPL) with procedures for obtaining just compensation, demand upon the state would have been futile.[9] *See ante* at

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[9] For purposes of determining whether a state provides adequate procedures for obtaining just compensation, it is unclear whether we should look to the availability of just compensation remedies (1) on the date of the taking (i.e., when both *Williamson* elements can be satisfied), *Williamson*, 473 U.S. at 194, 105 S.Ct. at 3120 ("all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist *at the time of the taking*" (references and internal quotations omitted, emphasis added; *Sinaloa Lake Owners Ass'n v. City*

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1493-94 & n. 12. NPL's claim, therefore, accrued when the Monroe County Planning and Zoning Department reached a final determination on the status of the property. This issue cannot be resolved based on the record on appeal.[10]

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*of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (for physical takings, date ordinance passes), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), or, viewing *Williamson*'s two prongs as essential elements of the cause of action, (2) at any time during the pendency of the claim in federal court, *see Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir.) (without citation to Eleventh Circuit precedent suggesting that Florida did not provide an adequate remedy at the time of the alleged taking of Executive 100's property, applied current Florida law to find that an adequate remedy existed and, therefore, that Executive 100's takings claim was not ripe), *cert. denied*,—U.S.—, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Greenbriar*, 881 F.2d at 1573 n. 7 ("ripeness [of a just compensation claim] goes to whether the district court had subject matter jurisdiction to hear the case").

[10] The record suggests two possible scenarios. The first scenario assumes that NPL could have, but did not, seek available variances or permits. *See* Fla. Stat. § 333.07(1), (2) (1989). Until NPL sought such relief, and that relief was denied, NPL's takings claims could not have accrued. Yet, the affect of the state circuit court's order quashing the zoning ordinance was to reinstate the prior, residential duplex zoning classification. With no further clarification possible, *Williamson*'s final decision requirement was satisfied. Under the scenario, therefore, NPL's takings claims would have accrued on the date of the circuit court's order, and, its claims would have been timely.

The second scenario assumes that it would have been futile for NPL to seek a variance or permit. This possibility is suggested by the state circuit court's "Final Summary Judgment" which found that the ordinance "enacted by defendant . . . only permitted use [of the property] as a private airport." Record, vol. 5, at 1, no. 158-22. Moreover, Florida law restricts the availability of variances and permits to uses which do not create "airport hazards." Fla. Stat. § 330.07(1)(a); *see also id.* § 333.01(3) (defining "Airport hazard"); *id.* § 333.02 ("Airport hazards contrary to public interest"); *id.* § 333.07(2)(a) (variances must not be contrary to the public interest). Given the small size of the property, I cannot imagine how a residential development could coexist with an operating airport without creating such a hazard. If it would have been

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But for *Corn III*, I would have remanded this case to the district court to resolve this issue.

EDMONDSON, Circuit Judge, specially concurring:

I concur in the judgment.

As the author of the opinion in *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) ("*Corn III*), I think some of Chief Judge Tjoflat's criticisms of the words used in that opinion are valid.[1] I write separately to stress that the *Corn III* decision still seems right to me and that the holding—as opposed to the opinion—in *Corn III* conflicts in no way with the holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). I also think that the Chief Judge generally gives *Corn III* more credit as a sweeping and powerful precedent than it deserves. As binding authority, *Corn III*, like all judicial decisions, is inherently limited to the facts of the case then before the court and the questions presented to the court in the light of those facts. What was decided in *Corn III* does need to be stripped of some obscuring and confusing dicta. And, I am contrite about there being a need to do that.

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futile to seek a variance or permit, NPL's takings claims would have ripened when the planning authorities rezoned NPL's property, *see Corn II*, 816 F.2d at 1516, and assuming the district court correctly applied the "continuing wrong doctrine", the statute of limitations would bar NPL's federal claims.

[1] As Winston Churchill said:

> I have derived continued benefit from criticism at all periods of my life, and I do not remember any time when I was ever short of it.

The Supreme Court decided *Williamson* under the ripeness doctrine. The Court held that a developer's failure to use available procedures to seek variances or to avail itself of state procedures for awarding just compensation meant that the developer's taking claim was premature. 473 U.S. at 193, 105 S.Ct. at 3120; *see also, MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986) (discussing *Williamson*). *Williamson* said nothing, much less made law, about the accrual of taking claims *for limitations purposes* or, put differently, about when limitations run against a landowner whose land is taken.

*Corn III*, in contrast, did decide whether the statute of limitations barred a developer's temporary taking claim. The *Corn III* facts are important. Very important, the federal court case for compensation for a temporary taking of property *followed* state court litigation in which the landowner had attacked as invalid and the local government had defended as valid certain ordinances. Almost six years passed between the time the local government finalized the offending zoning ordinances in July 1977 and the time a state appellate court finally invalidated the ordinances in February 1983. *See City of Lauderdale Lakes v. Corn*, 427 So.2d 239 (Fla. 4th DCA 1983). Seeking compensation for the temporary taking, Corn filed his federal suit less than a year after the state appellate court's decision.[2] The City argued that a four-year limitations period applied and barred Corn's federal action. 904 F.2d at 588. We held that no statute of limitations barred the federal temporary taking claim. *Id.* I believed this conclusion to be correct when I wrote the *Corn III* opinion. I believe it to be correct now.

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[2] In *First English Evan. Luth. Ch. v. Los Angeles County*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), the Court held that where a landowner's property is taken by a land-use regulation, the Constitution requires payment of just compensation "for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07, 107 S.Ct. at 2381. In deciding that "temporary" regulatory takings entitle landowners to just compensation, the Court expressly defined temporary takings as "those regulatory takings which are ultimately invalidated by the courts," *id.* at 310, 107 S.Ct. at 2383,

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Most important, *Corn III* did not decide (because it was unnecessary to decide) when Corn's taking claim first became ripe or mature for federal adjudication.[3] Anything the language of the *Corn III* opinion may imply about maturity or ripeness (the *Williamson* kind of issue) for Corn's claim is dicta.

The writing of a judicial opinion is mostly an experiment. Later events test the soundness of what was written; and new cases with new circumstances often show that an earlier opinion needs clarification or explanation. This need exists because, as Cardozo said, judge-made law is a chain forged link by link, that is, case by case.[4] The nature of future cases is unknowable; and, as a result, for judges to think much about circumstances except those immediately before the court is counterproductive.

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and explained that "[i]nvalidation of the ordinance . . . convert[s] the taking into a 'temporary' one . . . ." Id. at 319, 107 S.Ct. at 2388.

[3] This court had determined earlier that Corn's just compensation claim was ripe for federal review under the *Williamson* rule on the date the pertinent zoning decision was made. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987).

[4] Chief Justice Marshall touched on a similar idea as he explained the inapplicability of his opinion in *Marbury v. Madison* to a later case, *Cohens v. Virginia*, by using these words:

> It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.

*Cohens v. Virginia*, 19 U.S. 264, 399, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821).

Attempts to create broad propositions of law based upon one case are, I think, almost always wrong. And there should be a presumption that judges mean to do no more than to decide the case before them.[5]

Looking back at the *Corn III* opinion, I see that it drew too much from *Norco Constr., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986). *E.g., Corn III*, 904 F. 904 F.2d at 588 ("'. . . the same considerations that render a claim premature prevent the accrual of a claim for limitations purposes . . .'" (*quoting Norco*, 801 F.2d at 1146) ). Words in the *Corn III* opinion that encourage the inference that the moment for starting the running of a limitations period and the first moment of ripeness for federal adjudication must occur at the same time were unnecessary to the *Corn III* decision. The holding of *Corn III* and, therefore, its binding power as precedent, comes not from what the opinion says or its words imply, but from what *Corn III* decided considering the facts then before the court: the statute of limitations had not run. In essence, *Corn III's* holding would have been the same if I had written something more like *Gordon v. City of Warren*, 579 F.2d 386, 391-92 (6th Cir. 1987).[6] In *Gordon*, on facts materially similar to those in *Corn*, the court held that the statute of limitations on the federal taking claim did not start to run until the state appellate court had ruled that the pertinent zoning ordinance was invalid. Briefly stated, the *Gordon* court said that the local government's acts in defending its ordinance in court were, themselves, continuous acts of taking that extended the limitations period: in effect, a continuing wrong. I now think the *Gordon* opinion better explains what the court in *Corn III* decided and did, and I wish I had written the *Corn III* opinion accordingly. But, for law-of-the-circuit purposes, a study of *Corn III*—and every other precedent—ought to focus far more on the judicial decision than on the judicial opinion.[7]

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[5] I understand that the precedential sweep of decisions and opinions of the United States Supreme Court may possibly be broader than those of lower courts; my comments are limited to the decisions of lower courts, such as our own.

[6] I think we could have decided *Corn III* without an opinion and *Corn III's* precedential value would have been the same, although for some other cases this unity might not be true. We could have said in *Corn III* only that "The judgment of the District Court is AFFIRMED." If published, the decision would have precedential import. Considering that the *Corn III* appeal was only to decide whether the taking claim which was allowed by the district court ought to have been barred either by res judicata or by the statute of limitations, an affirmance of the district court judgment necessarily answered that the statute of limitations was no bar. This point is the holding of *Corn III*. And for me

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to write, accurately or inaccurately, about unnecessary legal propositions, such as ripeness and maturity, in the opinion would not (and does not) change or expand the scope of the holding as binding precedent.

[7] For good or for bad, opinion-writing judges—unlike legislators—can make cases decide no more than the cases present. For example, no matter how often or how plainly a judicial panel may put in its opinion that "we hold X," "X" is not law and is not binding on later panels unless "X" was squarely presented by the facts of the case and was a proposition that absolutely must have been decided to decide the concrete case then before the court. All readers of judicial opinions, but especially members of later judicial panels, have the right (for judges, the duty) to look beyond the words of an opinion in which a panel attempts to explain the reasons for its decision and to determine what was decided in reality. This process is, I think, largely what the study of law is about. And, despite my Chief's footnote one, the idea that a case is authority only for what it actually decides—that its authority does depend on "the fortuity of the actual facts" of the case— is not "odd," at least in the English-speaking world with its common law tradition. Nor do I believe it to be odd to recognize that some judicial decisions are correct even when the stated explanation for the decision is flawed. We are bound by the decisions of earlier panels of this court: like cases should have like results. We are not necessarily bound by the words of their opinions, although we may be persuaded by them even if not bound.

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There is no conflict between the law established by the *Corn III* decision on whether limitations bar federal temporary taking claims when the landowner has first undertaken to attack the offending land use ordinance in state court, and the law established in *Williamson*—on which I agree with the Chief Judge as near as I can tell—about the prematurity or unripeness of claims.

Neither the holding in *Corn III*, nor even the words in the opinion, require that "property owners [must] engage in . . . litigation in state courts before the property owners can repair to federal court to vindicate their federal right to just compensation." Tjoflat, C. J., concurring, at 1498. The reality is that *Corn III* dealt with a landowner who had, in fact, already engaged in state court litigation before the landowner came to federal court. *Considering those facts*, all that *Corn III* held was that the landowner's federal court claim to just compensation was not barred by the statutes of limitation. Given the limits of *Corn III*'s holding, I see no cause to expend scarce judicial resources, for example, to convene the court en banc, to address an

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Thus, *Corn III* is part of the law of the circuit. But the principle that binds later panels is limited: the statute of limitation does not run in circumstances like those in *Corn III*. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), always speaks of the binding power of earlier "*decisions*"—a view I wholeheartedly embrace—not of opinions, of general rules, or of judge-made "tests," "standards" or "guidelines." These latter things do advise future panels but do not, in themselves, command future panels. As I understand it, the Chief Judge's view of stare decisis considerably enlarges the customary view of this important concept. His view would absolutely require later panels not simply to follow earlier decisions, but to extend those precedents to cover materially different cases as long as the words of the earlier opinion point to a particular result in the later and different cases. One result of this approach is to put a premium on judges writing as broadly as possible in particular cases so as to give their point of view the broadest possible binding effect on later panels.

abstract, hypothetical "conflict" with *Williamson* inferred from words that were dicta in *Corn III.*[8]

As I end, I need to write on a different point. The Chief Judge says that taking claims can become ripe earlier than some words in the *Corn III* opinion suggest. I do not understand (but I fear someone might) the Chief Judge to say that he thinks the statute of limitations must begin to run as soon as a taking claim first becomes ripe for adjudication in federal court. No Supreme Court case so holds. And, I say that no good reason exists why that should be the law.

As a jurisprudential matter, the doctrine of ripeness rests on different considerations than do statutes of limitation. The ripeness doctrine concerns federal courts' constitutional authority to hear only "cases or controversies" and the corollary duty not to interfere with other arms of government until there is a case or controversy fit for adjudication. In contrast, statutes of limitation concern litigants' interest: the time at which the plaintiff's duty to pursue his claims promptly attaches, and, from the defendant's perspective, the time at which the rights to speedy trial and to avoid stale claims become an enforceable bar. Therefore, statutes of limitation serve familiar purposes distinct from ripeness considerations. And it is not strange that a matter may become ripe and yet the statute does not start to run.

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[8] Rehearings en banc are costly, time-consuming affairs for litigants and for the court as an institution. Delay in final disposition is inevitable. The court ought not go en bank lightly. We have a high duty, I think, to reconcile decisions if possible before going en bank to resolve "conflicts," that is, "to secure or maintain uniformity of [our] decisions." *See generally* F.R.A.P. 35. This reconciliation is aided considerably by ignoring dicta and reducing each decided case to its exact holding as demonstrated by the actual disposition of the case given its facts. When we read cases as if every pronouncement in every opinion is law, the courts appear to produce many generalized "principles" that arise apart from the process of deciding an actual case; and there will be more errors, more conflicts, and more "law" about which various judges can disagree and think en banc rehearing may be needed.

Also, where one of our decisions *plainly* contradicts a Supreme Court decision, I believe no need exists for an en banc rehearing. The panel that sees the plain contradiction should follow the Supreme Court's decision. If that course and the resulting panel decision create controversy, then perhaps that decision would be the subject of an en banc poll.

As a practical matter, we also want, in taking cases based on local land use regulation, no rule that makes landowners feel that it is risky to use the state courts to do a task for which the state courts are extremely well suited: to determine the validity or invalidity of the land use regulation. The landowners who go into state court are neither sleeping on their rights nor lulling local governments into thinking there is no problem. If landowners suspect that the statute of limitations may run on their federal compensation claims while they are in state courts they might either always ignore the state courts and come directly to federal court, or file in both state and federal court at the outset. Either way, we add to the workload of the federal courts needlessly and probably increase the likelihood that federal courts will be interfering in local land use determinations. It is one thing to be open to ripe taking claims; it is another to drive to federal courts in the first instance attacks on land use regulations. So, *Corn III*'s holding (that the statute of limitations will not run on a taking claim while state court litigation is underway to determine the validity of the underlying local regulation) seems like a good rule even if the taking claim became ripe for federal adjudication earlier.

# Appendix B

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## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

*New Port Largo, Inc. v. Monroe County,*
Case No. 87-10043-Civ-KING (S.D. Fla. Dec. 22, 1989)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

**CASE NO. 87-10043-CIV-KING**

NEW PORT LARGO, INC.,

*Plaintiff,*

*v.*

MONROE COUNTY,

*Defendant.*

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Monroe County has moved this court for summary judgment on the remaining two counts of plaintiff's complaint, pursuant to Federal Rule of Civil Procedure 56. Plaintiff opposes that motion.

According to Rule 56, summary judgment may be granted for the defending party when, the entire file in the case, together with any affidavits submitted, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court has carefully considered the file, hearing, and all submissions in this case in reaching its decision.

The remaining two counts of plaintiff's complaint—Counts I and IV—state a claim for unconstitutional taking of land by a zoning regulation. Plaintiff New Port Largo, Inc. (hereinafter "NPL") purchased certain land in Monroe County on September 1, 1979. On September 11, 1980, Monroe County effectively rezoned this land. NPL then sold all of the subject land on September 9, 1982: TFW, Inc. purchased one-half interest by warranty deed and First National Bank of South Miami, Trustee under Land Trust 741 (hereinafter "Land Trust 741") purchased the other half interest, also by warranty deed. (See *New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507 (S.D. Fla. 1988) for a detailed history of this case.)

Defendant's argument for summary judgment on plaintiff's takings claims rests on application of the statute of limitations. The relevant statute of limitations in four (4) years. *See New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507, 1514-15 (S.D. Fla. 1988). Defendant's last discernable wrongful act occurred on April 9, 1985.[1] *Id.* at 1518. Before it may apply the statute of limitations, however, the court must determine who defendant injured by its last wrongful act.

Defendant advances that NPL no longer held the subject property at the time of defendant's last committed wrong, and therefore defendant did not injure NPL by that wrong within the meaning of the continuing wrong doctrine. As noted above, NPL conveyed its entire interest in the controverted land on September 9, 1982 by warranty deed. The face of the deed specifies that the sale was for "good and valuable consideration"; therefore, consideration passed, as a matter of law, from TFW, Inc. and Land Trust 741 to NPL for the transfer of the property. In addition, a warranty deed transfers all right, title, and interest in the described property. The seller retains nothing that she does not claim to retain on the face of the warranty deed. *See* Fla. Stat. sections 689.01, .03, .071 (1987). Thus, NPL had no interest, under deed, in the property after September 9, 1982, and NPL could suffer no injury in the controverted property after that date.

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[1] In *New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507 (S.D. Fla. 1988), this court entered an order granting in part and denying in part defendants' motions to dismiss. In that order, the court considered the effect of the statute of limitations on plaintiff's claims. The continuing wrong doctrine surfaced as a determining factor of when the statute would begin to run. In that context, the court held that a continuing wrong exists, for purposes of the doctrine, only when defendant's wrongful activities continue, and not merely when plaintiff suffers. *See id.* at 1516.

NPL's claims against Monroe County for harm NPL sufferred while it owned the property began to run on September 9, 1982 under the applicable statute of limitations. NPL had four years within which to file its claims based on the harm done to it while it held the property—until September 9, 1986. On July 7, 1987, NPL filed its complaint in this action. This filing occurred ten-months late. NPL's claims are time-barred.

(Nothing in this court's order of November 12, 1988 (reported as *New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507 (S.D. Fla. 1988) and cited above) is to the contrary. There, the court held, on a motion to dismiss, that the statute of limitations did not preclude plaintiff's instant claims. At that time, however, the court had no knowledge of NPL's conveyance of the subject land to TFW, Inc. and Land Trust 741. Consequently, the court could not ascertain the true effect of the statute of limitations.)

In an effort to avoid the above-outlined effects of the statute of limitations, NPL attempted to obtain an assignment of whatever claims TFW, Inc. and Land Trust

741[2] may have had against Monroe County.[3] Neither TFW, Inc. nor Land Trust 741 has filed a suit, timely or otherwise, with this or any court. Those entities took title to the property on September 9, 1982. The last cognizable wrong committed by defendant occurred on April 9, 1985. Thus, the statute on TFW, Inc. and Land Trust 741's claims ran on April 9, 1989. NPL attempted to obtain an assignment from TFW, Inc. and Land Trust 741 on July 24, 1989—more than three months after the statute ran and when these entities no longer had any claims to assign to NPL. Therefore, even if the court assumes that NPL had perfected an assignment from these entities, TFW, Inc. and Land Trust 741's claims had already run under the applicable four-year statute of limitations. No matter what mechanism NPL maintains to assert this assignment, it remains a nullity.

Accordingly, after a careful review of the record, and in light of the foregoing discussion, the court

ORDERS and ADJUDGES that defendant's motion for summary judgment is GRANTED and the remaining counts of plaintiff's complaint are hereby DISMISSED WITH PREJUDICE.

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[2] Whether Land Trust 741 had previously assigned all of its rights to a third party, as defendant contends, ultimately has no effect on the court's analysis and result. Therefore, that alleged assignment will not be addressed.

[3] Arguably, as holders of the land, these entities would have suffered injury due to defendant's last wrongful act on April 9, 1985. One might also argue, however, that since TFW, Inc. and Land Trust 741 took with notice of the zoning problems, they had no constitutional takings claim. The court need not reach this issue to achieve a correct result here; it has resolved all doubt in favor of the plaintiff as it must when deciding a motion for summary judgment.

DONE and ORDERED in chambers at the United States Courthouse, Federal Courthouse Square, Miami, Florida, on this 22nd day of December, 1989.

/s/
JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Maurice J. Kutner, Esq.
Michael Seward, Esq.
Jeffrey B. Crockett, Esq.
Robert J. Fiore, Esq.
Charles George, Esq.
Randy Ludacer, Esq.

# Appendix C

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*New Port Largo, Inc. v. Monroe County,*
706 F.Supp. 1507 (S.D. Fla. 1988)

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United States District Court,
S.D. Florida.

Nov. 21, 1988.

**No. 87-10043-Civ.**

NEW PORT LARGO, INC., etc., et al.,

*Plaintiffs,*

*v.*

MONROE COUNTY, etc., et al.,

*Defendants.*

Ferraro, Seward & Stanton, P.A., Miami, Fla. by Michael R. Seward, Coan, Couture, Lyons & Moorehead, Washington, D.C. by Andrew P. Murphy, Joseph B. Allen, III, Key West, Fla. by Joseph B. Allen, III, Maurice Jay Kutner, Miami, Fla., for plaintiffs.

Morgan & Hendrick, P.A., Key West, Fla. by James T. Hendrick, Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey by Franklin G. Burt, Floyd Pearson Richman Greer Weil Zack & Brumbaugh, P.A., Miami, Fla. by Robert L. Floyd, Alan G. Greer, Robert J. Fiore, for defendants.

## ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

JAMES LAWRENCE KING, Chief Judge.

After the plaintiffs voluntarily dismissed several original defendants, the remaining defendants Monroe

County, the County Commissioners (Donald Schloesser, Alison Fahrer, Curt Blair, George Dolezal), the members of the Monroe County Planning and Zoning Board (Nat Funke, William Keefer, Robert Curry and David Richards, Jr.) (hereinafter referred to as "Planners") and Joseph Sharit moved to dismiss.[1] Collectively, these defendants raise many of the same arguments for dismissal, as well as a few that depend solely upon their individual status. The court has carefully considered the oral argument of counsel and the record in this case.

The complaint alleges a lengthy and intriguing rezoning procedure of the property herein involved. The plaintiffs' factual scenario begins in October of 1967 when an individual named Sheley (acting as Trustee for prospective purchasers) applied to the Trustees of the Internal Improvement Fund (TIIF) to purchase submerged lands that eventually became the property in question. In August of 1968, the TIIF sold the subject property to Sheley. The plaintiffs contend that Sheley orally agreed to permit Monroe County to use the subject property as an airstrip.

In 1970 Sheley's trusteeship expired and an individual by the name of Bassett became the Trustee. Sheley, however, continued to manage the property under the power of attorney executed by Bassett.

The plaintiffs contend that the first zoning of this property occurred in December, 1972, when the county platted the subject property into residential lots zoned for RU-2 duplexes.

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[1] The court currently finds the need to vacate its July 27, 1988 order that denied the motions to dismiss of the defendants Dolezal, Curry, Sharit and Richards. With all the extensive filings now before the court, the court believes the interests of justice dictate that these defendants' motions be viewed as a whole with the current ones. The court, therefore, will vacate the previous order and consider anew these defendants' motions.

The actual named plaintiffs begin to appear in 1979. An individual named Lance and the plaintiff Netter formed New Port Largo, Inc. for the purpose of purchasing the subject property for development into residential duplexes. Lance subsequently sold his interests to the plaintiff Marr. In September, 1979, New Port Largo purchased the property from Bassett.

The plaintiffs allege that at this point in time a massive conspiracy commenced involving homeowners in the adjacent community of Port Largo. The purpose of the alleged conspiracy, as set forth in the complaint, was to acquire plaintiffs' land without compensation and convert it to the benefit of the adjacent homeowners and the county.

At this time, the plaintiffs contend, the county decided to rezone the property to achieve its wrongful goals. They state that on November 27, 1979, the county filed an application to rezone the subject property from residential RU-2 to PA, public airport use. The county's rezoning application was approved by the County Planning and Zoning Department in January, 1980. In September, 1980, the county commissioners upheld that decision and a series of lawsuits ensured. In October, 1980, plaintiffs filed a petition for certiorari in state Circuit Court alleging that the rezoning was in violation of Florida law. This case was entitled *New Port Largo, Inc. v. Monroe County, et al.*, Case No. 80-1164-17. In April, 1982, Monroe County filed a constructive trust suit in state Circuit Court, claiming that as a result of an alleged oral agreement between the County and Sheley, the equitable ownership of the subject property vested in the county. This case was entitled *Monroe County v. New Port Largo, Inc.*, Case No.

82-432-17. The county filed a second case in state Circuit Court in December, 1982. This suit for unjust enrichment alleged that New Port Largo purchased the property even though it knew the County and not the seller Sheley owned the subject property. This action was entitled *Monroe County v. New Port Largo, et al.*, Case No. 82-1606-17.

In April, 1983, State Circuit Judge Knuck granted summary judgment against the county's constructive trust suit. Circuit Judge Lester dismissed the county's unjust enrichment suit with leave to amend the complaint. In May of 1983, the county filed an amended unjust enrichment suit, but in September of that year, stipulated in open court to dismiss the suit. In November of 1983, the Florida Third District Court of Appeal reversed the summary judgment entered against the county. 441 So.2d 173. In March of 1984, Judge Knuck conducted a non-jury trial on the merits and found for the defendant New Port Largo. The Third District Court of Appeal affirmed final judgment on the merits in April, 1985. 467 So.2d 757. Subsequently, in January of 1986, Judge Lester granted New Port Largo a final summary judgment on its petition for certiorari.

On July 7, 1987, the plaintiffs filed this complaint in the United States District Court. The plaintiffs seek a variety of relief in eleven counts. The first three counts are for violations of the Federal Civil Rights Acts, with Count I alleging a violation of 42 U.S.C. § 1983, Count II alleging a violation of 42 U.S.C. § 1985, and Count II alleging a violation of 42 U.S.C. § 1986. The remaining counts are pendant state law claims, with Count IV alleging an unjust taking, Count V asserting an abuse of process claim, County VI a malicious prosecution claim, Count VII a disparagement of title claim, Count VIII a tortious interference claim, Count IX an intentional infliction of emotional stress claim, Count X a negligent infliction of emotional stress claim, and Count XI a broad-based conspiracy claim.

On March 11, 1988, the court approved a stipulation wherein the parties agreed that certain of these claims would be dismissed. Pursuant to this order, Counts I through VIII, and paragraphs 193(a) through (f) of Count XI were dismissed as they related to the individual plaintiff shareholders.[2] Counts V-XI were dismissed as they related to Monroe County. The plaintiffs' claim for punitive damages was dismissed only as it related to the 42 U.S.C. § 1983 claims.

The defendants have now moved to dismiss the remaining counts of the complaint asserting several arguments. These defendants make three arguments for dismissal of the federal claims: the claims are barred under *res judicata*; the statute of limitations completely bars this action, and the plaintiffs have failed to state a § 1985 claim. The Commissioners and Planners also seek dismissal of the federal claims based upon alleged absolute immunities. All these defendants also assert several arguments for the dismissal of the pendant claims based on Florida law. Because the resolution of the federal issues here render as moot many of the arguments based on Florida law, the court will first address the *res judicata*, statute of limitations, and § 1985 arguments, then decide the absolute immunity questions, and end its analysis with a discussion of the remaining, relevant Florida law arguments.

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[2] The plaintiffs have agreed to dismiss Counts I-XII with respect to all defendants as they relate to the plaintiffs' status as individual shareholders. The court agrees with the plaintiffs' reasoning, and will order dismissal.

The plaintiffs also assert Counts IX, X, and XI in their individual capacities and the defendants seek to dismiss these claims as they relate to the plaintiffs' individual status. These claims, seeking to remedy emotional distress and individual damages derived from the purported conspiracy, allege individual injury. The plaintiffs can properly assert these claims in their individual capacity. The defendants' motions to dismiss these counts, therefore, will be denied.

## I. THE *RES JUDICATA*, STATUTE OF LIMITATIONS AND § 1985 REASONS FOR DISMISSAL.

Upon consideration of the record, the motions to dismiss and oral argument of counsel, the court denies the motions to dismiss based on the *res judicata* and statute of limitations grounds. The motions to dismiss the § 1986 claim (Count III) as time-barred, and the § 1985 claim for failing to state a cause of action, are granted.

### a. The *res judicata* argument.

The defendants[3] argue that two state court judgments bar the plaintiffs from asserting these federal claims. First,

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[3] Although the record at this state is extremely limited, the court finds that only Monroe County can properly assert a *res judicata* defense. This defense is only available to defendants who were parties in the previous action. *Kent v. Sutter*, 40 So.2d 145 (Fla. 1949). In some cases, the privy of a record part may be entitled to the defense. *See In re Hastin Estate*, 63 So.2d 320 (Fla. 1953). The persons generally considered as privies are those with a mutual or successive relationship to the same rights the parties presented in the first action. *See Osburn v. Stickel*, 187 So.2d 89 (Fla. 3d DCA 1966). Monroe County appears to be the only named plaintiff in the constructive trust suit. The County Commissioners did not have a successive or mutual interest in that action. Similarly, the Planners and Sharit had no interest in the constructive trust action. The *res judicata defense*, therefore, is only available to Monroe County.

Nevertheless, even if the defense was available to all defendants, the court's *res judicata* analysis above would defeat the motions to dismiss. All these defendants make the same argument, and the court's discussion defeats all these contentions.

Moreover, the court could rewrite the *res judicata* defense of the Commissioners. Planners, and Sharit as one of offensive collateral

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they submit that these plaintiffs voluntarily dismissed their counterclaim in the constructive trust suit, and that they, therefore, are barred from now raising any claims arising out of facts similar to those supporting the counterclaim. The defendants also make an alternative argument. They contend that the final judgment in the constructive trust suit bars all claims based on the same or similar facts even if the dismissal of the counterclaim has no preclusive effect. This argument is premised upon the compulsory counterclaim rule. These arguments, however, do not square with the principles of *res judicata*, and, therefore, the court rejects them.

The court beings [*sic*] its analysis by addressing the question of whether a final state court judgment can preclude subsequent federal constitutional claims. The Eleventh Circuit has answered the issue. An action under § 1983 in federal court is precluded if the issues involved in the action could have been raised in a prior state court proceeding. *See Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1444 (11th Cir. 1987) (interpreting *Migra v. Warren City School District Bd. of Education*, 465 U.S. 75, 80-85, 104 S.Ct. 892, 895-98, 79 L.Ed.2d 56 (1984)); *see also Webber v. Mills*, 595 F.Supp. 514, 515-516 (S.D.Fla.1984). To determine the preclusive effect of such a state court proceeding, a federal court must apply the law of the state that rendered the judgment. *See McDonald v. Hillsborough County School Board*, 821 F.2d 1563, 1565 (11th Cir. 1987). Title 28 U.S.C. § 1738 requires the federal court to give the same preclusive effect to a state court judgment as the

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estoppel. Collateral estoppel could bar relitigation of certain issues even if these defendants were not part of the previous action. This defense, however, is limited to those questions actually decided in a previous action. As is noted in the text above, none of the issues the plaintiffs now present was previously adjudicated; hence, this defense would also be inapplicable.

state court would give. *See also Magra v. Warren City School District Board of Education*, 465 U.S. 75, 77, n.1, 104 S.Ct. 892, 894 n.1, 79 L.Ed.2d 56 (1984). Accordingly, the Florida law of *res judicata* applies.

Under Florida law, a final judgment is absolute. The judgment puts to rest all matters which were or could have been determined in that action, and bars subsequent actions between the same parties based on the same or substantially similar causes of action. *See O'Brien v. Brickell Townhouses, Inc.*, 439 So.2d 982 (Fla. 3d DCA 1983). In Florida the doctrine of *res judicata* applys [*sic*] when four "identities" exist. These identities are (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the quality of the person for or against whom the claim is made. *See Albrecht v. State*, 444 So.2d 8, 12 (Fla.1984).

For the most part, the doctrine of *res judicata* appears applicable. The first, third and fourth identities are present. Also, Florida finds the second identity to be satisfied if the current action presents any issue which was or could have been litigated in the first action. *See Albrecht v. State*, 444 So.2d at 12; *McDonald v. Hillsborough County School Board*, 821 F.2d at 1565. The test for determining whether the second cause of action is identical to the first is whether facts essential to bringing the second action are identical to those facts which were essential to the maintenance of the prior state action. *See Miami Beach v. Prevatt*, 97 So.2d 473 (Fla. 1957). Generally, if the testimony produced in the first action is essentially the same as the testimony that would be required to try the second action, then Florida courts conclude that both actions are founded upon the same cause of action. *See Gordon v. Gordon*, 59 So.2d 40 (Fla.1952) *cert. denied* 344 U.S. 878, 73 S.Ct. 165, 97 L.Ed. 680 (1952). Because the federal claim here alleges a constitutional taking and the counterclaim was for an unlawful taking, the second identity under the above precedents appears to be satisfied. Necessarily, the evidence to establish both of these claims is essentially similar. Accordingly, on the surface the four identities necessary for the doctrine of *res judicata* appear to be present.

Under stricter scrutiny, however, the court finds the *res judicata* principles inapplicable here. A voluntary dismissal without prejudice of a counterclaim is not a final decision on the merits. A final judgment or decree on the merits is essential to the operation of the doctrine of *res judicata*. *See Lewis v. Connecticut General Life Insurance Company*, 427 So.2d 254 (1983) (citing authority). Florida generally considers voluntary dismissals to be beyond the scope of the *res judicata* doctrine. In *Wormser v. State*, 384 So.2d 310 (5th DCA 1980), the court found that a voluntary dismissal without prejudice, even after the jury rendered its verdict was an inadequate "final" judgment for *res judicata* purposes. The *Wormser* court's finding is sound, for a voluntary dismissal without prejudice is not an adjudication on the merits. Because the voluntary dismissal without prejudice of the counterclaim is not a "final" judgment, the doctrine of *res judicata* is inapplicable.

For similar reasons, the court rejects the theory that the final judgment entered against defendants bars the plaintiffs' litigation of these federal claims. In essence, the defendants maintain that even if the voluntary dismissal of the counterclaims is not entitled to *res judicata* effect the federal claims here should have been asserted as a counterclaim in the constructive trust suit. Because these claims were not asserted as counterclaims, the defendants now argue that they are barred. A court may bar a party from asserting a claim in a subsequent action if that party failed to raise that claim as a counterclaim in the previous action. To determine whether the *res judicata* doctrine would bar such a claim, the court must determine whether the proposed counterclaim would have been compulsory or permissive. If compulsory, the claim is barred, *Newton v. Mitchell*, 42 So.2d 53 (Fla. 1949); if permissive, the claim can be relitigated. *Metropolitan Casualty Insurance Co. v. Walker*, 151 Fla. 314, 9 So.2d 361 (1942). Under this analysis, therefore, the plaintiffs' claims in this action are barred if they would have been compulsory counterclaims under Florida law in the constructive trust suit.

The plaintiffs' federal claims were not compulsory counterclaims in the constructive trust suit. Florida law defines a compulsory counterclaim as a claim that arises out of the same transaction or occurrence forming the basis of plaintiffs' claim. See Fla.R.Civ.P. 1.170(a). The county's constructive trust suit concerned transactions centering around a trust agreement that purchased and sold the subject property between 1967 and 1970. The plaintiffs' federal civil rights claims here revolve around the defendants' activities from 1979 until 1985. Moreover, the alleged defendants' activities in the federal counts are unrelated to the trust agreement and initial purchase and sale of the property. Consequently, the plaintiffs' current claims, as alleged, did not arise out of the same transactions or occurrences forming the basis of Monroe County's constructive trust suit. These federal claims, therefore, were not compulsory counterclaims under Florida law, and, therefore, are not barred from litigation in this forum.[4]

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[4] The court finds the defendants' authorities to be unpersuasive. Perhaps the best authority for the defendants' arguments is *Quality Type & Graphics v. Guetzloe*, 513 So.2d 1110 (Fla. 5th DCA 1987). *Quality* is easily distinguished. In *Quality Type*, Quality sued Guetzloe for account stated and quantum meruit but withdrew the quantum meruit claim prior to trial. Quality lost under account stated theory. Subsequently, Quality sued Guetzloe for quantum meruit, and the court

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b. The statute of limitation arguments.

The defendants maintain that all of the plaintiffs' claims are time-barred by appropriate statute of limitations. They suggest two critical dates. The first date is 1979, when the plaintiffs allege that most of the purported harms occurred. The second date is July, 1987, when the plaintiffs filed their complaint. The defendants maintain that no limitations analysis allows claims founded upon facts in 1979 to be litigated in 1987. The plaintiffs counter, arguing that the defendants themselves tolled the applicable statutes of limitations by their continuing wrongdoing.

With respect to the first two federal claims, the § 1983 and § 1985 causes of action, the statutory language of these sections does not specify a limiting period. To determine an appropriate time frame, a federal court must follow a three step process. *See Burnett v. Grattan*, 468 U.S. 42, 47-48, 104 S.Ct. 2924, 2928, 82 L.Ed.2d 36 (1984). The first step requires the federal court to look to the laws of the United States so far as such laws are "suitable to carry the civil and criminal civil rights statutes into effect." *Id.* If no suitable federal rule exists, the federal court must undertake the second step by considering application of

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found *res judicata* applicable. *Id.* at 1111. Under the facts of *Quality Type*, the quantum meruit claim arose from the same transaction as the account stated claim. Under traditional *res judicata* analysis, Quality had to raise the quantum meruit claim in the first action or that cause of action would be barred. Quality's dismissal of the quantum meruit claim, therefore, was a [sic] barred a subsequent action under this theory. Here, these current claims did not arise out of the same transactions as the constructive trust lawsuit. Consequently, these current claims did not have to be raised in the constructive trust action. The plaintiffs here are not barred from bringing those claims because they were not obligated to bring these claims in the constructive trust action.

state common law as modified and changed by the constitution and statutes of the forum state. *Id.* As the third step, the federal courts must apply the state law only if it is not "inconsistent with the Constitution and laws of the Unites States." *Id.* The Supreme Court in *Wilson v. Garcia*, 471 U.S. 261, 267-68, 105 S.Ct. 1938, 1942-43, 85 L.Ed.2d 254 (1985), held that no law of the United States was suitable for a limitations period for § 1983 claims. The Court, therefore, required federal district courts to apply the most appropriate or most analogous state statute of limitations to a § 1983 claim. The *Wilson* court found the personal injury statute of limitation of the state whose law is to be applied to be the most analogous state statute of limitations for a § 1983 claim. *Wilson*, 471 U.S. at 275, 105 S.Ct. at 1947.

Under this analysis, this court must determine the most appropriate personal injury statute of limitations of Florida. Florida has no personal injury statute of limitations *per se*. Nonetheless, the parties agree that the four year periods of Fla.Stat.Ann. § 95.11(3)(a), (o) and (p) apply. These statutory subsections govern actions for intentional torts. As such, the court finds that they are the appropriate statute of limitations here. The sections 1983 and 1985 claims here, therefore, are governed by this four year limitations period.

In stark contrast to the above federalism analysis section 1986 claims are specifically governed by a one-year statute of limitation. The statutory language of 42 U.S.C. § 1986 mandates that this claim be brought within one year after the cause of action has accrued.

Irrespective of the fact that a state statute of limitations governs two of the three federal claims, federal law exclusively determines when all three causes of action accrue. *See Calhoun v. Alabama Alcoholic Beverage*

*Control Board*, 705 F.2d 422, 424 (11th Cir. 1983) (citing *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980); *see also Lavellee v. Listi*, 611 F.2d 1129, 1130 (5th Cir. 1980)). Under federal law, the time of accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Calhoun*, 705 F.2d at 424; *Lavellee*, 611 F.2d at 1131.

With this background, the court now determines whether under the allegations of the complaint any of these claims are time barred. In so doing, the court first considers the plaintiffs' arguments concerning tolling doctrines for the federal claims and then applies the appropriate limitations periods.

The plaintiffs knew of the invasion of their legal rights in 1979. The complaint lists this year as the date of rezoning to a public airport district. Plaintiffs agree that the rezoning is part of the basis of this lawsuit. Absent tolling of the statute of limitations, the plaintiffs concede that all three federal claims are time-barred.

The plaintiffs, however, argue that the limitations periods were tolled according to the "continuing wrong" theory. The continuing wrong tolling theory exists "where a continuous chain of events or course of conduct is involved, in which case the cause of action accrues at the time of the final act in that series of events ~~or course~~ of conduct." *See Barbaccia v. County of Santa Clara*, 451 F.Supp. 260, 266 (N.D. Calif. 1978); *Coleman v. Clark Oil & Refining Co.*, 568 F.Supp. 1035, 1040 (E.D. Wisc. 1983). The plaintiffs' theory is that the defendants' activities constituted a continuing wrong, until January 2, 1986, when Circuit Judge Lester issued a writ of certiorari and struck down the zoning provision. Accordingly, they timely asserted all three federal claims by filing their complaint on July 7, 1987. The court now addresses this theory with respect to each of the federal civil rights claims.

The continuing wrong tolling doctrine may not apply to section 1986 claims. The best argument in favor of application rests upon a unification of two realizations. Because the continuing wrong doctrine has been applied in section 1985 cases, *see Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), and because liability under section 1986 is dependent upon the existence of a claim under section 1985, *see Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985); *Weseman v. Meeker County*, 659 F.Supp. 1571 (D.Minn.1987), a court applying the doctrine to the § 1985 actions but not to § 1986 claims is incongruous. The best argument against application is that the one year statute of limitations is specifically spelled out in the statute, and, thus, a court must always follow this limitation. *See E.G. Creative Environment, Inc. v. Estabrook*, 491 F.Supp. 547, 554 (D.Mass.1980) (finding in dicta that all claims based upon activity occurring prior to one year before the filing of the federal suit were barred even though the action centered around a five year zoning dispute.).

The court, however, need not decide which of these arguments is best. Under either argument, the plaintiffs' § 1986 claim here is time-barred. Even after the court assumes that the plaintiffs' tolling theory applies, and therefore, the § 1986 claim accrues on January 2, 1986, the claim is barred by the applicable one year statute of limitations. The plaintiffs' filed this action on July 7, 1987, which is eighteen months after their own purported accrual date. As the complaint itself indicates, the filing of this action occurred beyond the prescribed one year period, and, therefore, the section 1986 claim is time-barred.

When, after taking the plaintiffs' allegations in the complaint as true, a claim is time barred on its face, the granting of the motion to dismiss is proper. *See Kaiser Aluminum & Chemical Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir.1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). Accordingly, the court dismisses the section 1986 claim with respect to all defendants.

To determine whether the continuing wrong theory applies to the § 1983 and § 1985 claims, the court must first determine the meaning of "a continuing wrong." Both parties here have offered differing interpretations, and federal decisions vary over the precise instances when a "continuing wrong" exists. This court holds that the focus of the continuing wrong doctrine should be on the defendants' purported wrongful activities, and not upon the plaintiffs' alleged suffering. Accordingly, if the defendants' activities constitute a continuing or additional violation of the law, then the doctrine applies; however, if the defendants' activities do not constitute a continuing violation, then the doctrine does not apply, irrespective of the fact that the plaintiffs' harm from the defendants initial violation may continue. The court reaches these conclusions after reviewing the conflicting decisions on the continuing wrong doctrine.

In *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558-559, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977), the Supreme Court discussed the continuing wrong tolling doctrine. The Court exclusively emphasized the defendants activity in reaching its result. The Court stated that the critical question to be resolved before it would apply the doctrine was whether the defendants subsequently violated the civil rights laws. *Id.* at 558, 97 S.Ct. at 1889. In *Evans*, United Airlines established a seniority system that gave present effect to a past act of discrimination. *Id.* The Court specifically noted that not only did no present violation existed but no violation occurred after the initial discriminatory wrongdoing. Because United Airlines had not subsequently violated Title VII, no continuing wrong existed irrespective of the fact that the plaintiff was still injured from the past discriminatory act. The court, therefore, focused exclusively upon the defendant activities and concluded that unless the defendants committed subsequent violations of the law, the doctrine did not apply. *Id.*

In essence, several courts of appeals have agreed with *Evans*. In *Altair Corp. v. Carmen Pesquera De Busquets*, 769 F.2d 30 (1st Cir.1985), the First Circuit noted the distinction between a continuing violation and a single act that has continuing consequences. In *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir.1981), the Ninth Circuit concluded that a continuing violation is "occasioned by continuing unlawful acts, not by continued ill effects from an original violation." Both the *Ward* and *Altair* courts emphasized the need for a subsequent action by the defendant that violated the law. *Ward*, 650 F.2d at 1147; *Altair*, 769 F.2d at 32.

The distinction between a continuing wrong and a continuing injury has great consequences in zoning cases. Often, a wrongful zoning of a piece of property can take years to correct. Courts have struggled to determine whether a zoning wrong begins and ends with the passage of the zoning ordinance or continues until the wrongful ordinance is dissolved. Normally, in an action to rectify the government's taking of private property, the appropriate statute of limitations runs from the time of appropriation. *See Schaefer v. Stack*, 641 F.2d 227, 228 (5th Cir.1981); *Kittrel v. City of Rockwell*, 526 F.2d 715, 716 (5th Cir. 1976). Nevertheless, in *Lockary v. Kayfetz*, 587 F.Supp. 631, 636 (N.D.Calif.1984), the court noted in dicta that the statute of limitations in a civil rights suit alleging a wrongful taking by a city through an unlawful zoning restriction did not begin to run until the offending restraint had been removed. *Lockary* is, however, the exception. All unlawful taking claims should be treated similarly, irrespective of the fact that the taking occurred through a zoning ordinance. In all such instances, the government has performed a single act that "took" the property. Accordingly, most "taking" situations are not within the continuing wrong doctrine.

This conclusion, however, does not mean that the continuing wrong doctrine could never apply in the zoning context. As the Fourth Circuit noted in *Ocean Acres Limited Partnership v. Dare County Board of Health*, 707 F.2d 103, 105-106 (4th Cir. 1983), certain other actions may combine with the initial government activity and be sufficient to evoke the continuing wrong toll. In *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), the Sixth Circuit considered such a situation. In *Gordon*, the city mistakenly issued a building permit to the plaintiffs, who started to build an apartment complex. The city realized the parties made a mutual mistake with respect to an ordinance requiring the construction of a highway, and directed the construction to stop. When the property owners refused to dismantle the buildings, the city sought an injunction. The trial court entered judgment for the city, and directed that two of the buildings be removed. The defendants appealed and the Michigan Court of Appeals reversed. The city then appealed to the Michigan Supreme Court which affirmed the Michigan Court of Appeal's decision in favor of the property owners. On these facts, the Sixth Circuit found that the statute of limitations period was tolled under the continuing wrong doctrine until the date the Michigan Supreme Court upheld the invalidity of the ordinance. *Gordon*, 579 F.2d at 391-392. The *Gordon* court believed the city engaged in a continuing course of action, including the lawsuits, which made "it impossible for the plaintiffs to enjoy the full use of their property until that time." *Id*. at 391. The court found that because the city continually appealed, the question of whether the city had in fact taken the plaintiff's property for public use remained in controversy. *Id*. Accordingly, when the Michigan Supreme Court finally declare the ordinance invalid, the city's last act designed to take the property in violation of the civil rights law ended. At this point in time, the cause of action ultimately accrued to the property owners. *Id*. at 392.

As the plaintiffs' complaint indicates, this case falls within the holding in *Gordon*. The plaintiffs alleged that the defendants engaged in a conspiracy which manifested itself through the several alleged acts that purportedly took the plaintiffs property without compensating them for it. The first act was the passage of the zoning ordinance. The next acts were the filing of two lawsuits by Monroe County in an attempt to permanently take the property. The result of these various acts by defendants was to continue the temporary taking of the plaintiffs property. Plaintiffs allege these acts constituted continuing violations of the Civil Rights Laws. Under the reasoning of *Gordon*, therefore, the court can apply the continuing wrong tolling doctrine.

Nevertheless, the mere fact that additional wrongs were committed besides the unlawful zoning does not automatically invoke the theory. The continuing wrong doctrine is an equitable doctrine. A court must balance all the equities involved before applying the doctrine. In *Jordan v. Rocco*, 648 F.Supp. 942 (N.D.Ohio 1986), the court formulated a two prong test designed to incorporate these equitable considerations into the determination of whether the continuing wrong tolling principle applies. *Id*. at 946. The first prong concerns the plaintiffs' actions. The plaintiff challenging the validity and constitutionality of an ordinance must be "diligent and vigilant in pursuing his or her remedies against the validity of the ordinance." *Id.* The second tenant is that the government agency must continuously oppose the individual and enforce the ordinance. *Id.*

The complaint here alleges that the plaintiffs were vigilant in pursuing their remedies against the validity of the ordinance. They challenged the ordinance before the Planning and Zoning Department. They appealed the Planning Department's adverse decision to the county commissioners. When the county commissioners upheld the Planning and Zoning Department's ruling, they filed a petition for writ of certiorari in the Circuit Court. They were ultimately successful on January 2, 1986, approximately eighteen months before they filed this suit. Moreover, as already noted, the county took other actions in an alleged attempt to take the property without compensation. Plaintiffs' allege that these government activities continuously opposed the plaintiffs and constituted a continuing attempt to take the property. As such, this activity satisfies the second prong or continuing controversy requirement of the *Jordan* test. Because both aspects of the *Jordan* test are satisfied here, the continuing wrong tolling doctrine applies.

The court now determines the parameters of the tolled period. The complaint states the last action taken by the County and the purported conspiracy members in the alleged taking scheme was when the County appealed the decision in the constructive trust suit.[5] This final act terminated when the Third District Court of Appeal affirmed Judge Knuck's finding against the County in the constructive trust suit. As in *Gordon*, this judicial decision ended the defendants last act that was designed to permanently take the property and had the effect of continuing the temporary taking. Under the continuous wrong theory, a cause of action is tolled and only accrues at the time of the final act in that series of events or course of conduct. *See United States v. Dickinson*, 331 U.S. 745, 748-49, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947). The final act of the defendants here occurred on April 9, 1985 when the Third District Court of Appeals affirmed the final judgment in the constructive trust suit.

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[5] The court specifically rejects the plaintiffs' alleged January 2, 1986 date of accrual. This is the purported date when the writ of certiorari case terminated. The plaintiffs initiated this action. Under no circumstances can this case be construed as a defendant's action designed to continuing the taking. The defendants have to be allowed to defend an action brought against them. Because the defendants did not institute the lawsuit, this action cannot be an activity of the defendant for "continuing wrong" purposes.

After applying the continuing wrong theory here, the court concludes that these two federal claims were timely filed. Under this tolling doctrine, the § 1983 and § 1985 claims accrued on April 9, 1985. The plaintiffs filed this action on July 7, 1987, which was within the governing four year limitations period. These actions, therefore, are timely.

The § 1986 claim is dismissed because that claim was not timely filed. The court applies the continuing wrong tolling doctrine to the § 1983 and § 1985 claims and finds that the plaintiffs timely filed these actions. The court now turns its attention to the substance of the allegations in the § 1985 claims.

All the defendants seek to dismiss the § 1985 claim for failing to state a cause of action because plaintiffs are not the type of individual Congress intended to protect by enacting the statute. The plaintiffs counter by arguing that they fall within the protections of the equal protection clause of the Fourteenth Amendment, and § 1985 guarantees all the protections of this Amendment. After examining both views, the court dismisses this claim.

Count II alleges violations of two subsections of § 1985. The first alleged violation is of § 1985(2) and deals with the defendants' attempts to impede, hinder and obstruct the due course of justice in the State of Florida. The second alleged violation is of § 1985(3). This claim alleges that the defendants denied the plaintiffs equal protection of the laws solely because of the plaintiffs' status as real estate developers. The defendants seek a dismissal under both subsections.

With respect to § 1985(3) claim, the court must draw a fundamental distinction. The equal protection clause of the Fourteenth Amendment guarantees that a government will treat similar individuals in a similar manner. Accordingly, the equal protection clause concerns itself with all governmental drawn classifications, although the analysis under the Clause requires that classifications based on certain characteristics be treated more strictly. *Cf. Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (holding that a zoning ordinance created a classification in violation of the equal protection clause). Congress, on the other hand, never intended § 1985(3) to be as broad. "The predominant purpose of § 1985(3) was to combat the prevalent animus against Negros [*sic*] and their supporters." *See United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836, 103 S.Ct. 3352, 3360, 77 L.Ed.2d 1049 (1983). The *Scott* Court noted that the question of whether § 1985(3) was intended to reach any class-based animus other than animus against blacks was a close question. *Id.* The *Scott* Court reviewed the legislative history concerning the Civil Rights Act of 1871 and concluded that Congress intended this provision to be exceedingly narrow. *Id.* The Court concluded that no convincing legislative history existed to support the proposition that Congress intended § 1985(3) to reach conspiracies motivated by bias towards others on account of their economic views, status, or activities. *Id*. at 837, 103 S.Ct. at 3361. In the Court's opinion, "such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt the 1871 Congress would have intended when it passed the provision in 1871." *Id.; see also Daigle v. Gulf States Utilities Co. v. Local No. 2286*, 794 F.2d 974, 979 (5th Cir. 1986).

Under this analysis, therefore, the plaintiffs' claim fails. The defendants' purported discrimination is directed against the plaintiffs as real estate developers. The classification based upon real estate developers is one founded upon the defendants' economic views, or status, or activities. The alleged discrimination classification is not based on either race or minority-supporting political status. Accordingly, Congress never intended § 1985(3) to remedy the defendant's alleged denial of the equal protection of the laws to the plaintiffs because they are real estate developers.

A similar analysis follows for the § 1985(2) component of the plaintiffs' § 1985 claim. Once again, a distinction first needs to be drawn. Subsection 1985(2) has two portions. The first portion concerns conspiracies that interfere with the administration of justice in the federal courts. The second part prescribes conspiracies that interfere with the administration of justice in state courts. *See Kush v. Rutledge*, 460 U.S. 719, 725, 103 S.Ct. 1483, 1487, 75 L.Ed.2d 413 (1983) (noting distinction). The first part of § 1985(2) does not require race or class based animus. *Kush v. Rutledge*, 460 U.S. at 720, 103 S.Ct. at 1484-85. The second part of subsection 1985(2), however, requires class based animus. *See Daigle v. Gulf States Utilities Co., Local No. 2286*, 794 F.2d 974, 979 (5th Cir.1986); *See also Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422, 1430 (8th Cir. 1986); *Bretz v. Kelman*, 773 F.2d 1026, 1030 (9th Cir. 1985); *Williams v.*

*St. Joseph's Hospital*, 629 F.2d 448, 451 (7th Cir.1980); *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir.), *cert. denied* 436 U.S. 906, 98 S.Ct. 2238, 56 L.Ed.2d 405 (1978). The reason for this requirement is that the second part of § 1985(2) is directed at conspiracies to deprive equal protection of the laws, and the equal protection language in subsection 1985(2) is paralleled in subsection 1985(3). *Daigle*, 794 F.2d at 979.

Because the appellant does not meet the class based animus requirement under subsection 1985(3), his subsection 1985(2) claim equally fails. The plaintiff relies upon the second portion of subsection 1985(2), claiming that the defendants conspired to impede and hinder the due course of justice in the State of Florida. Once again, the alleged violation of the equal protection of the laws is premised upon the defendants' discrimination against the plaintiff as a real estate developer. This alleged discrimination exists only because of the plaintiffs' economic status as real estate developers. Congress never intended § 1985 to remedy this type of discrimination. Accordingly, Count II in its entirety will be dismissed.

## II. THE IMMUNITIES TO THE FEDERAL CLAIMS.

Both the Commissioners and Planners seek to dismiss the plaintiffs' federal claims by asserting absolute immunities. These defendants assert these immunities because they believe they enacted the rezoning ordinance, that action gives rise to the § 1983 claim here in their legislative capacity. After reviewing these arguments, the court will dismiss the § 1983 claim as to all these defendants, except Alison Fahrer.[6]

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[6] Before the court enters into this inquiry, the court must distinguish officials sued in their official capacity from those sued in their individual capacity. Individual capacity suits seek to impose

*(Footnote continued on next page)*

After the Supreme Court's decision in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), courts have consistently held that local legislators are absolutely immune under § 1983 for conduct performed in furtherance of their legislative duties. *See Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982); *Hernandez v. City of LaFayette*, 643 F.2d 1188, 1195 (5th Cir. 1981); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982). No immunity, however, exists for actions outside the sphere of legitimate legislative activity. *See generally Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Accordingly, the absolute immunity inquiry becomes one of whether the local government officials acted within legislative activity.

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*(Footnote continued from previous page)*

personal liability upon a government official for actions taken under color of state law. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 237-238, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1984)). Official capacity suits "general represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55, 98 S.Ct. 2018, 2035 n.55, 56 L.Ed.2d 611 (1978). "As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Graham*, 473 U.S. at 166, 105 S.Ct. at 3105. Accordingly, when an official is sued in his official capacity, the suit does not seek personal liability.

The plaintiffs have asserted these counts against the County Commissioners and the Planners in their official capacities. These actions, therefore, are essentially against Monroe County. Because the plaintiffs have already sued Monroe County, the plaintiffs in essence seek a double recovery. This understanding alone would mandate this court to dismiss these individuals. Nevertheless, because these defendants are absolutely immune from § 1983 liability even in their individual capacities, the court will consider these defendants as sued in their individual capacity. Accordingly, the immunity discussion above is entirely appropriate, and would bar this action against these individuals in any context.

Before determining whether the Commissioners and Planners were acting in their legislative capacity, the court must consider both a substantive and a procedural rule. On the substantive side, absolute immunity is given only for legislative functions, while qualified immunity is given to those officials acting in their executive function. This analysis leads to the procedural rule. Absolute immunity defeats a damage suit at the pleading stage, *see Lockary v. Kayfetz*, 587 F.Supp. 631, 638 (N.D. Calif.1984), while qualified immunity is available only if the evidence shows that those actions were taken in good faith, and, thus, is available at the summary judgment or trial stage. *See Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611 (8th Cir.1980).

The court must now determine whether the Commissioners and Planners' actions were legislative or executive. The complaint essentially asserts three activities of these defendants that violated § 1983. The first activity concerns the Planning and Zoning Board's filing the application for the rezoning of the subject property. The second action involves the Planning Board's approval of its own application. The third alleged action in County Commissioner's upholding that decision. The complaint also alleges that one Commissioner, Alison Fahrer, maliciously testified against the plaintiffs' interests in a somewhat related lawsuit.

These first three actions are exclusively legislative, and, therefore, the Commissioners and Planners are entitled to absolute immunity with respect to these activities. Legislative activity involves the promulgation of legislation of a general or prospective nature. *Lockary*, 587 F.Supp. at 637, *citing Barbaccia v. County of Santa Clara*, 451 F.Supp. 260, 268 (N.D.Calif. 1978). Generally, the passing of zoning ordinances are part of the legislative function. *See Gorman Towers, Inc.*, 626 F.2d at 612, 613.

Similarly, a veto by the Mayor or Governor is part of the legislative process. *See Hernandez*, 643 F.2d at 1194. In essence, any official proposing a policy or making a policy is acting in a legislative capacity. *See Hernandez*, 643 F.2d at 1194; *Healy v. Town of Pembroke Park*, 643 F.Supp. 1208, 1213, 1214 (S.D.Fla.1986). These instances contrast sharply with actions found to be of an executive nature. Of course, if the individual officials directed action be taken to carry out these policies the action would be an executive, as when a City Supervisor directs the county counsel to file a lawsuit. *See Kuzinich*, 689 F.2d at 1350; *Lockary*, 587 F.Supp. at 638. With respect to the first three activities, the Commissioners and Planners were acting wholly within their legislative functions. The complaint indicates that these defendants proposed a policy change and then made a policy decision. The filing of an application for rezoning, as well as voting on the rezoning proposal require these defendants to balance social needs in their official capacity. *See generally Kuzinich*, 689 F.2d at 1350. As such, these defendants are entitled to an absolute immunity from the alleged § 1983 violations. Accordingly, the court dismisses Count I against the Commissioners and Planners with respect to the first three alleged activities.

With respect to Alison Fahrer's purported false testimony at a state court proceeding, the court finds that she is not entitled to an absolute immunity. Testifying in a judicial proceeding is not a legislative activity. The court cannot find that Fahrer has absolute immunity with respect to this activity. The court, therefore, will deny the motion to dismiss the § 1983 claim with respect to this alleged activity.[7]

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[7] The defendant Sharit also argues that he is immune. He premises this argument upon his status as the attorney representing the

*(Footnote continued on next page)*

## III. THE APPLICATION OF PENDANT JURISDICTION PRINCIPLES.

With respect to the Commissioners and Planners other than Fahrer, the court should no longer exercise jurisdiction over them on the pendant claims. In *United Mine Workers of America, Inc. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), the Supreme Court held that a federal district court should not exercise discretionary jurisdiction over pendant state claims after the federal claims are dismissed pursuant to Fed.R.Civ.P. 12. Accordingly, the court will dismiss without prejudice the pendant state claims with respect to all the Commissioners and Planners except defendant Alison Fahrer.

## IV. THE ARGUMENTS FOR DISMISSAL OF THE STATE LAW CLAIMS.

The court now turns to the remaining dismissal motions concerning the pendant claims of Monroe County, Sharit and Fahrer. These arguments track those raised for the federal claims. These defendants initially argue that plaintiffs' claims are barred by the doctrine of *res judicata*, or, in the alternative, by the appropriate statute of limitations. They next seek dismissal based on certain state law immunities. They then seek dismissal of the malicious prosecution and abuse of process claims for

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*(Footnote continued from previous page)*
homeowners. He does not assert that he has any official, governmental authority.

This argument is patently frivolous. Not surprisingly, Sharit produces no authority to support this position. An attorney generally acts as an agent for his client. As will all principle-agent relationships, the agent and principle are liable, although some indemnities may exist. Even if these common-law indemnities existed here, they would not insulate Sharit from liability under the federal civil rights laws.

failure to state causes of action. They conclude their arguments by noting that at the very least, the punitive damage demands should be stricken.

### A. The *Res Judicata* and State [*sic*] of Limitations Arguments.

The defendants make *res judicata* and statute of limitations arguments in an attempt to dismiss the state law claims.[8] The defendants premise these arguments upon reasoning similar to that supporting their arguments on the dismissal of the federal claims. As a necessary consequence, much of the court's analysis that follows is similar to its previous discussion of the federal issues.

Again, the defendants point toward the plaintiffs' counterclaim in the constructive trust lawsuit and argue that the plaintiffs raised in that counterclaim the very same claims they now do. The defendants, therefore, argue that these claims cannot be relitigated here. As an alternative argument, the defendants contend that these current claims should have been raised in the constructive trust suit, and because these causes of action were not part of the previous action, the plaintiffs cannot assert them here.

As the court found with respect to these same arguments for dismissal of the federal claims, these arguments are unpersuasive. A *res judicata* effect cannot flow from the voluntary dismissal without prejudice of a counterclaim. Under Florida law, this type of judicial action is not a final adjudication on the merits. Similarly, these current claims did not have to be asserted in the constructive trust action in order to avoid a *res judicata* effect. These current causes of actions would not have been compulsory counterclaims in the previous suit under Fla.R.Civ.P. 1.170(a).

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[8] As noted *supra* at footnote 3, the defense of *res judicata* is available only to the defendant Monroe County. Fahrer and Sharit were not parties to the previous action.

In considering the statute of limitations arguments, the court will first determine the appropriate limitations period, and then apply the appropriate periods to the allegations of the complaint.

As a stark contrast to the methodology utilized for the federal claims, most of the Florida limitations periods are governed by statutes. Count IV for unjust taking, Count V for abusive process, Count VI for malicious prosecution, Count VIII for tortious interference, Count IX for intentional inflictional emotional distress, and Count X for negligent inflictional emotional distress are governed by the four year statute of limitations prescribed in Fla.Stat.Ann. § 95.11(3)(o) and (p). Count XI, the conspiracy count, is also governed by a four year statute of limitation. *See Faulk v. Allen*, 152 Fla. 413, 12 So.2d 109 (1943). Count VII, the disparagement of title claim, is governed by the two year provision in Fla.Stat.Ann. § 95.11(6). *See Carey v. Buyer*, 75 So.2d 217 (Fla. 1954).

Although nonstatutory, the Florida accrual rule mirrors the federal rule. In Florida, the cause of action accrues when the injured party discovers or should have discovered the invasion of his rights. *See Lund v. Cook*, 354 So.2d 940 (Fla.1st DCA 1978).

The court does not have a sufficient basis for determining whether Count IV, the unjust taking claim, is timely filed. The plaintiffs do not specifically allege which act of the defendants did the taking, much less when that act was committed. As a consequence, the court will dismiss this count, and grant the plaintiffs leave to amend this count to allege the precise action, and its corresponding date, that consummated the alleged taking.[9]

Count V, the abuse of process count, is timely filed. The four year period prescribed in Fla.Stat.Ann. § 95.11(3)(o) applies. The plaintiffs' allege that the defendants abused the legal process in bringing their state court actions. An essential element of this tort is that the process be used for some immediate harmful purpose. With only an initial view of the complaint, this claim appears untimely, for these state court actions commenced in 1982. Nonetheless, the complaint appears to allege other purportedly abusive tactics that occurred during these actions. At this stage, the court cannot determine precisely when the last of these abusive tactics ended, but believes that the last of the actions most likely ended on April 9, 1985, when the action finally was resolved. For purposes of resolving the motion to dismiss, the court will utilize this alleged date, and find the abuse of process claim to be timely filed.

In Count VII, the plaintiffs do not state with specificity which acts of the defendants disparaged the plaintiffs' title, or when these acts occurred. The court finds such facts to be material, and dismisses this claim without prejudice to amend this count.

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[9] As opposed to the federal constitutional taking claim here, the unlawful taking claim usually centers around one specific action that "took" the property. This action most likely is the rezoning of the property. No "continuing wrong" doctrine applies to this claim. As far as Florida law is concerned, the single act of rezoning "took" the property. This framework significantly differs from the federal analysis, which concentrates not only upon the act of taking but also upon the other actions that continue the taking. Accordingly, the unlawful taking claim here appears to be time-barred. The court, however, cannot so find because the complaint does not specifically state the precise act of taking. The court's dismissal, with leave to amend, is the appropriate ruling for now.

In Counts VIII, IX, X and XI, the plaintiffs do not specifically allege the precise actions that caused the purported harms. The need for these acts, and the corresponding times in which they are alleged to have occurred, is manifest because the allegations in the complaint cover a twenty year time period. Accordingly, the court dismisses these claims without prejudice to amend.

### b. Causes Of Action For Malicious Prosecution And Abuse of Process Are Stated.

The defendants collectively move to dismiss the malicious prosecution and abusive process claims arguing that these counts do not state causes of action. After reviewing the Florida law governing these claims, the court disagrees.

As this court noted in *Miami Herald Publishing Company v. Ferre*, 636 F.Supp. 970, 977 (S.D. Fla. 1985) a Florida malicious prosecution claim has six elements. These are:

(1) The commencement or continuance of a civil or criminal proceeding;

(2) The defendant commenced or caused the commencement of the proceedings;

(3) The bona fide termination of the civil or criminal proceedings in favor of the plaintiff;

(4) Lack of probable cause for the proceedings;

(5) The defendant acted with malice;

(6) Damage to the plaintiff.

*Id.*

The defendants claim that the plaintiffs have failed to adequately allege the malice claim. The defendants rely upon the final order of Circuit Judge Lester (attached as an exhibit to the complaint). The state Circuit Judge found that the defendants acted in good faith in enacting the rezoning. Defendants argue that this finding defeats the malicious element of this claim.

The court believes that the plaintiffs have sufficiently alleged a malicious prosecution claim to survive a motion to dismiss. Judge Lester's finding concerned matters relating to trust agreements and unjust enrichment and not the zoning proceeding.

For similar reasons the defendants' arguments with respect to the abuse of process claim fail. In *Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla.3d DCA 1984), the court established the elements necessary to state an abuse of process action. In particular the court noted that the use of the process must be for an immediate purpose other than that for which it was designed. The defendants argue that the finding of good faith in Judge Lester's order precludes a cause of action for abuse of process. As set forth above, the plaintiff allege that the defendants misused process in two lawsuits other than the one that gave rise to Judge Lester's order. A cause of action for abuse of process, therefore, is stated, and the court now addresses the state law immunities.

C. The State Law Immunities.

Both the defendant county and defendant Fahrer seek to dismiss Counts IV through XI based on two statutory immunities: Fla.Stat.Ann. § 768.28(9)(a) and § 768.28(6)(a). Fahrer also seeks to dismiss Count VII based on her alleged absolute privilege. The court now addresses these issues in turn.

At this pleading state, the court must draw all reasonable inferences from the complaint in favor of the plaintiff. Having done so, the court concludes that the immunity under Fla.Stat.Ann. § 768.28(6)(a) is inapplicable. The complaint alleges that the defendant Commissioners and Planners acted in their official capacities when allegedly harassing the plaintiffs. Accordingly, these allegations are outside the immunity established in § 768.28(9)(a). Under this statute, the State or its subdivisions are immune from liability for actions of an employee (or agent) committed outside the scope of the employment. These allegations, therefore, are sufficient to defeat the motion to dismiss based on the immunity stated in § 768.28(9)(a). Here the plaintiffs allege the officials acted outside the scope of their duties.

For similar reasons, Fla.Stat.Ann. § 768.28(6)(a) is inapplicable. Section 768.28(6)(a) requires nothing more than statutory notice before an action can be maintained against the state, one of its agencies or one of its subdivisions. The county, however, is not entitled to statutory notice with respect to Count IV. In *Young v. Palm Beach County*, 443 So.2d 450, 451-452 (Fla. 4th DCA 1984), the court found the statutory notice requirement of § 768.28(6) to be inapplicable to an inverse condemnation claim. The court's reasoning centered around the fact that an inverse condemnation case did not sound in tort. *Id*. at 452. Count IV of the plaintiffs' complaint is essentially one for inverse condemnation and under the *Young* precedent, the county was not entitled to statutory notice. Similarly, Fahrer, as a County Commissioner, is not entitled to statutory notice. The language of § 768.28(6)(a) only requires statutory notice for claims against the state, one of its agencies or one of its subdivisions. County

Commissioners are not specifically included. Accordingly, the statutory notice requirements of § 768.28(6)(a) are inapplicable and the motion to dismiss, based on these arguments, will be denied.

D. Punitive Damages.

The defendants argue that under no circumstances should the County or Fahrer be liable for punitive damages.[10] They rely upon Fla.Stat.Ann. § 768.28(5), and argue that this statutory prohibition against punitive damages applies to both the County and Fahrer.

The plaintiffs agree that § 768.28(5) prohibits the recovery of punitive damages against the county. Indeed, the explicit language of § 768.(28)5) prohibits such a recovery.

Section 768.28(5), however, does not prohibit the recovery of punitive damages against the defendant Fahrer. This statute does not refer to agents of the state, and the defendants have failed to cite any authority extending § 768.28(5) this far. Accordingly, the court will reject Fahrer's reasoning, and deny her motion to dismiss based on this reasoning.

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[10] With respect to the punitive damages demanded for the federal civil rights claims, two notations must be made. In the first instance, the plaintiff has voluntarily dismissed the punitive damage demand for the county's purported violation of § 1983. Secondly, punitive damages are recoverable against offending officers for their violations of the civil rights laws. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252, 101 S.Ct. 2748, 2752, 69 L.Ed.2d 616 (1981). This recovery, however, is only against the offending officer in his or her individual capacity. *Id.* Because the plaintiffs have not demanded punitive damages against Fahrer in her individual capacity, the court will dismiss the demand for punitive damages against Fahrer. The court will also grant the plaintiffs leave to amend their complaint to include the defendant Fahrer in her individual capacity.

## IV. Conclusion.

After examining all the defendants' arguments, the court ORDERS AND ADJUDGES as follows:

1. This court's order denying several motions to dismiss dated July 7, 1988 is vacated;
2. Counts II and III of the plaintiffs' complaint are DISMISSED as to all defendants;
3. Count I of the plaintiffs' complaint is DISMISSED with respect of the defendants Blair, Dolezal, Schlosser, Sorensen, Funke, Keefer, Curry, and Richards, Jr.;
4. Counts IV, VII, VIII, IX, X, and XI of the plaintiffs' complaint are dismissed as to all defendants.
5. The plaintiffs are hereby granted leave to amend their complaint with respect to Counts IV, VII, IX, X, and XI within thirty days.
6. Pursuant to the parties' agreement, Counts I, V, and VI DISMISSED with respect to all defendants as these claims relate to the plaintiffs' status as individual shareholders;
7. All other motions to dismiss are DENIED.

DONE AND ORDERED.

# Appendix D

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ORDER OF THE U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
*New Port Largo, Inc. v. Monroe County*
MAY 20, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**No. 90-5091**

NEW PORT LARGO, INC., a Florida corporation,
CHARLES H. NETTER and STUART D. MARR,

*Plaintiffs-Appellants,*

NEW PORT LARGO, ETC.,

*Plaintiff,*

*versus*

MONROE COUNTY, a political subdivision of the State of Florida, KENNETH SORENSEN, board Member of County Commissioners, Monroe Planning & Zoning, DONALD SCHLOESSER, Commissioners Board, ALISON FAHRER, Commissioners Board, CURT BLAIR, Commissioners Board, and GEORGE DOLEZAL, Commissioners Board,

*Defendants-Appellees,*

WILHELMENIA HARVEY, ET AL,

*Defendants.*

**90-5327**

NEW PORT LARGO, INC.,
CHARLES H. NETTER and STUART D. MARR,

*Plaintiffs-Appellees,*

NEW PORT LARGO, ETC.,

*Plaintiffs,*

*versus*

MONROE COUNTY, a political subdivision of
State of Florida,

*Defendant-Appellant,*

KENNETH SORENSEN, ETC., ET AL,

*Defendants.*

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Circuit Judge, EDMONDSON, Circuit Judge, DYER, Senior Circuit Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( X ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

(   ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Gerald Bard Tjoflat]
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

# Appendix E

Monroe County, Fla., *Code* art. XIV,
§§ 19-295 to 19-302 (1987)
(Private Airport District)

## ARTICLE XIV. PA - PRIVATE AIRPORT DISTRICT

### Sec. 19-295. Intent.

(a) The PA district is intended to provide a classification of property where the private airport may be established. The provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter. All requests for PA classifications hereunder shall be deemed major development projects and shall be processed accordingly.

(b) The zoning director shall not give zoning approval for any building permits for any structure to be located within or adjacent to any private airport area if, when built, said structure would constitute a violation of the protective provisions of this article. (Ord. No. 14-1979, § 1)

### Sec. 19-296. Definitions.

(a) *Private airport* means an airport used primarily by the licensee but available for use by invitation of licensee. Limited service may be provided if authorized by the zoning department.

(b) *Runway* means the paved or unpaved surface of an airport landing strip.

(c) *Structure* means an object constructed or installed by man, including, but without being limited to, buildings, derricks, draglines, cranes and other boom-equipped machinery, towers, signs, smokestacks, utility poles or overhead transmission lines.

(d) *Helicopter* means a powered rotorhead vehicle that can hover. All other aircraft shall utilize airports. (Ord. No. 14-1979, § 1(1))

### Sec. 19-297. Landing strip lengths and widths.

(a) Effective landing length shall be no less than eighteen hundred (1800) feet.

(b) Primary surface width shall be one hundred (100) feet.

(c) Usable width shall be no more than fifty (50) feet. (Ord. No. 14-1979, § 1(2))

### Sec. 19-298. Landing approach zones.

(a) The landing approach zone for private airports is a trapezoidal area increasing gradually in width from fifty (50) feet either side of the runway center line, at the ends of each usable runway, to a width of three hundred and fifty (350) feet either side of the runway center line at a distance of three thousand (3,000) feet outward from the ends of each runway.

(b) Approach zones shall be clear of obstructions above a glide path of 20:1 from the ends of each usable runway. When the approach zone to any runway crosses a road, the glide path must pass at least fifteen (15) feet above the edge of the nearest traffic lane. (Ord. No. 14-1979, § 1(3))

### Sec. 19-299. Prohibited uses.

Within or adjacent to the PA district, no establishments or uses that emit smoke, gas or dust in quantities or densities sufficient to jeopardize the safe use of private airports shall be allowed. (Ord. No. 14-1979, § 1(4))

### Sec. 19-300. Nonconforming uses.

(a) The purpose of these regulations is to ensure the continued use of existing private airports. Under the provisions of this ordinance, should there be a conflict between the rights of the existing airports and surrounding properties, the rights of the existing airports shall take precedence. The zoning board and/or county commission may grant variances to any surrounding property owner so that reasonable use of the surrounding property may be had without interfering with the operation of the private airport.

(b) The provisions of this article shall not be construed to require the removal, lowering or other change or alteration of any structure or tree or use lawfully in existence not conforming to the regulations as of the effective date hereof. After the effective date hereof, property owners shall not be permitted to grow or maintain trees to heights in excess of those provided herein. Nothing herein contained shall require any change in the construction, alteration or intended use of any existing structure, the construction or alteration of which was lawfully begun prior to the effective date of this article.

(c) On any new proposed private airports, the rights of the surrounding property owners shall take precedence. All regulations involving private airports, such as runway lengths, etc., shall be predicated on the priority rights of surrounding properties. (Ord. No. 14-1979, § 1(5))

Sec. 19-301. Private helicopters.

(a) Private helicopters, after meeting all the following requirements, and after receiving zoning board approval, may receive a one-year permit to operate same from any zoning district, and said permit shall be renewable by the zoning director if he deems appropriate; otherwise the same will require approval of the zoning board.

(1) A corridor of three hundred and sixty (360) degrees from the landing spot shall be established, with a radius of five hundred (500) feet, in which there shall be no residential use, except for the applicant.

(2) Any obstruction within the corridor shall be lower than an approach slope of a 5 horizontal to 1 vertical ratio.

(3) The center landing spot shall be marked as designated by FAA regulations. All landings shall be accomplished to the center landing spot.

(4) All distances and heights shall be based on ground level.

(5) All helicopters may land at any airport subject to FAA and local airport regulations.

(b) None of the above regulations shall apply to medical or emergency evacuation.

(c) Special medical evacuation locations may be granted by the zoning board without meeting the above requirements, as may be judged to be in the public interest. (Ord. No. 14-1979, § 1(6))

### Sec. 19-302. Penalties and enforcement.

Each violation of this article or any regulation, order or ruling promulgated hereunder shall be punishable as provided by section 19-26. (Ord. No. 14-1979, § 1(7))

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

No. 93-259

In The

# Supreme Court of the United States

October Term, 1993

◆

MONROE COUNTY, FLORIDA,

*Petitioner,*

v.

NEW PORT LARGO, INC.,

*Respondent.*

◆

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

◆

## BRIEF IN OPPOSITION

◆

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## QUESTIONS PRESENTED FOR REVIEW

### I

MAY THE STATUTE OF LIMITATIONS ON A FEDERAL CLAIM FOR JUST COMPENSATION BASED ON A ZONING DECISION BE TOLLED WHILE A PROPERTY OWNER PURSUES STATE COURT CHALLENGES TO THE VALIDITY OF THE ZONING DECISION?

### II

ARE THERE ANY REASONS FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW A CASE WHICH IS NOT IN CONFLICT WITH THE LAW OF ANY OTHER CIRCUIT OR OF THIS COURT WHEN THERE ARE MULTIPLE REASONS WHY RESPONDENT'S CLAIM WAS TIMELY BROUGHT?

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## STATEMENT OF THE CASE

Respondent, NEW PORT LARGO, INC. ("NPL"), hereby responds to the Petition for Certiorari filed by MONROE COUNTY as follows:

The facts as stated by Petitioner are misleading in the extreme. The County's factual description departs from chronological order and omits many pertinent events. Thus, NPL feels constrained to briefly recite the pertinent facts.

*Purchase.* On September 1, 1979, NPL bought the property at issue (9.65 acres fronting on the Atlantic Ocean) as part of a purchase for $3.2 million and other consideration. NPL, relying on the residential zoning in place, intended to develop the lots for sale as homesites. As of that time, the property had been platted into residential lots; the County had required that subdivision improvements be done for residential development and had for years collected taxes and levied solid waste assessments on the property as residential lots. (Appendix 1).[1] The prior owner had indeed allowed the road on the property to be used as an airstrip as a temporary measure pending eventual residential development. A lease for that purpose would (and did) expire in 1982. (R1-1; R12-243; R13-253).

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[1] Appendix 1 contains the factual findings in a Florida state court judgment in an action between these parties which was later affirmed on appeal. See discussion of "title lawsuit," infra.

*Rezoning*. On January 24, 1980, the property was rezoned to "private airport" by Monroe County's Zoning Board on application of the County itself. NPL unsuccessfully appealed the rezoning to the Monroe County Commissioners on September 11, 1980. The County's stated bases for the action were that the County needed the airport for its citizens and that the County was in fact entitled to actual ownership of the property because of certain allegedly broken promises to the County by the original owner of the subject property in the 1960's. The County intended that the airport continue to be used as a *public* airport. The zoning, however, required use for a *private* airport, which under Florida law, Fla.Stat. 330.27 (10), (11), (see also Petitioner's Appendix E to Writ for Cert. at E-1) was an airport usable only by the airport operator and its guests. A "public airport," by contrast, is "open for use by the public." Fla.Stat. 330.27(11) (1979). As a Florida state court would find in the state court zoning challenge:

> The airport located on the subject property operated by the lessee was a public airport. (App. 1).

Florida law has contained procedures, in place since 1945, for the acquisition of land by municipalities for airport purposes. Fla.Stat. 330.01-330.12 (1979). Florida law provides that airport property "may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of such property on the terms of such acquisition, and otherwise by condemnation in the manner provided by [law]." Fla.Stat. 332.01(2). Rezoning to airport without the owner's agreement is, not surprisingly, not an option contemplated by

Florida law. The County, nonetheless, chose this expedient.

*Start of Litigation.* Following the County's rezoning, in October 1980 NPL filed a challenge to the rezoning in state law certiorari proceedings, claiming that the rezoning was a departure from the essential requirements of law. The County's defense to NPL's zoning challenge was essentially to file a separate action, the title lawsuit, against NPL claiming that in fact title to the property in question belonged to the County itself as beneficiary of a constructive trust. After four years, this title lawsuit was ended in NPL's favor with the County's arguments of fraud wholly discredited. See state court Judgment, Appendix 1, *aff'd., Monroe County v. New Port Largo,* 467 So.2d 757 (Fla. App. 1985). In addition to NPL's zoning challenge and the County's title lawsuit, the County filed an unjust enrichment lawsuit against NPL, which was eventually dismissed with prejudice, (R11-215) and cooperated against NPL's airport tenant in eviction and bankruptcy proceedings involving that tenant. (R1-1 99; R9-184; R15-290) All this litigation collectively lasted from 1980 through 1986. (R1-1).

*"Sale" or Transfers of Property in 1982.* The County's petition is pervaded by its false and misleading assertion that New Port Largo "sold" the property at issue on September 9, 1982. The undisputed facts are quite different than the County's argument suggests. New Port Largo was beneficially owned in equal shares by two individuals, Mr. Netter and Mr. Marr. In 1982, in the midst of bitter litigation against the County, Mr. Netter and Mr. Marr transferred half of the lots into a corporation owned by Mr. Netter and half into a trust for the

benefit of Mr. Marr. This is stated in an *uncontradicted* affidavit (Appendix 3; R12-243). It is *undisputed* that "the beneficial owners of New Port Largo, Stuart Marr and [Charles Netter] remained such and in the same proportion [50-50] after the 1982 transfers." *Id.* Thus, there was no change in the substance of ownership between 1979 and the ultimate invalidation of the zoning as confiscatory in 1986. In no sense did the owners of the property at issue "divest" themselves of it as the County alleges.

*Zoning Challenge Successful in State Court.* Once the title lawsuit was resolved, New Port Largo pressed its state-law zoning challenge to a conclusion. Despite the title transfers, NPL remained the party plaintiff in this action, which was proper under the Florida substitution of parties rule, Fla.Rul.Civ.P. 1.270(c), which is similar to, and even more permissive than, Fed.R.Civ.P. 21(c).

New Port Largo argued, among other challenges, that the taking was invalid under state law and a taking under federal law. The state court invalidated the zoning, holding, inter alia, that "the subject property did not qualify by dimensions to meet the requirements as a public airport or a private airport" and that "rezoning of this property, now determined [in the title lawsuit] to be private, to airport, would deprive the owner of any reasonable use." (Final Judgment, App. 2).[2] Accordingly, pursuant to Florida law, e.g., *Kasser v. Dade County*, 344

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[2] Appendix 2 contains the Final Judgment in NPL's zoning challenge.

So.2d 928, 929 (Fla. App. 1977); *see, Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) (describing certiorari remedy under Florida law for confiscatory zoning), the rezoning was invalidated. The County has never appealed this judgment nor moved to collaterally attack this judgment on any ground. NPL did not appeal, of course, since it obtained the declaratory relief it had requested, the only relief then available under Florida law.

*Initiation of Federal Lawsuit*. NPL filed the instant lawsuit in July 1987 seeking, among other things, just compensation for the temporary taking of its property. The County's immediate response was to move that the action should be dismissed as barred by the four-year statute of limitations. The district court, in a reported decision, denied the motion on the ground that the County's alleged actions, including the title lawsuit, represented a "continuing wrong" against plaintiff which tolled the running of the section 1983 statute of limitations. *New Port Largo v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1986). The County did not in any way question this ruling on appeal of the Final Judgment to the Eleventh Circuit. It is thus the law of this case that (assuming a unity of ownership) the continuing wrongs alleged by the County were sufficient to toll the statute of limitations until the conclusion of the title litigation in 1985.

Monroe County later moved for summary judgment on the argument that, solely because of the 1982 transfers, NPL did not suffer any "continuing wrong" after 1982. Monroe County cited no authority to suggest that a change in the form of ownership among the same beneficial owners would affect the liability of a state governmental agency for a "taking." Nor did the County explain why NPL's defense of the title lawsuit in which it was the defendant and NPL's pursuit of the eviction and other litigation did not serve as a "continuing wrong" to NPL past 1982. Moreover, the transferee title owners executed an Assignment and ratification to confirm that NPL was the proper plaintiff, able to pursue all of their claims as well as its own. Appendix 3. This Assignment and ratification agreement related back to the initial filing of the Complaint in 1987, pursuant to Fed.R.Civ.P. 17. Nonetheless, the district court, without citation of any case authority, granted Monroe County's motion for summary judgment on the limitations ground.

*Reversal on Appeal.* On appeal of this dismissal, reported at 985 F.2d 1488 (11th Cir. 1993), the Eleventh Circuit reversed based upon an intervening precedent, *Corn (III) v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990). The Court held that NPL's pursuit of the zoning challenge tolled the running of the section 1983 statute of limitations. The Eleventh Circuit did not reach other bases for reversal raised by appellant. Like the existence *vel non* of a taking, the Eleventh Circuit left the effect, if any, of the 1982 transfers as an issue for the district court on remand. *New Port Largo v. Monroe County*, 985 F.2d at 1490 n.2. After the Eleventh Circuit's denial of Petitioner's motions for rehearing and rehearing in banc, without seeking a response from NPL, Petitioner filed the instant petition for certiorari.

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## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision rendered by the United States Court of Appeals for the Eleventh Circuit does not conflict with any decision of this Court or of another United States Court of Appeals on the same matter and because there are no special and important reasons for this Court to review the above-entitled case.

Like every court of appeals which has addressed the question, the Eleventh Circuit has ruled that a landowner's pursuit of state law challenges to land use regulation may toll the accrual of the statute of limitations for an inverse condemnation or "just compensation" claim. The Eleventh, Sixth and Ninth Circuits are in accord with this holding, and no court of appeals has ruled to the contrary. Moreover, the policy considerations served by this rule of law - namely, encouragement of local land use law disputes to be resolved in state court - fully support it. There is no special importance to this case, or compelling argument raised by Petitioner, sufficient for the court to address an issue on which the courts of appeals are in accord.

Moreover, there are other legal hurdles to the Petitioner's ultimate success on the statute of limitations issue even if its challenge to the decision of the Eleventh Circuit is upheld. Respondent's claim would still be timely because (1) the continuing wrongs of Monroe County, as previously held by the district court, prevented accrual of the statute of limitations; (2) equitable tolling principles of Florida law tolled the statute of limitation; (3) a federal district court would have been compelled to abstain in any lawsuit brought before resolution of all original state court litigation; and (4) NPL's direct claims for compensation under the Constitution would be timely under the borrowed limitation period for Florida real property actions.

Based on the above, the Petition for Writ of Certiorari should be denied.

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## ARGUMENT
## REASONS FOR DENYING THE WRIT

### I.

### THE DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THOSE OF OTHER CIRCUITS

The gist of Petitioner's argument is that the holding of the court below is inconsistent with this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In fact, as the majority below noted, no such inconsistency exists. The *Williamson* opinion states that exhaustion of state review procedures of, for instance, zoning actions, is not required before a section 1983 action for inverse condemnation *may* be commenced. *Williamson*, 473 U.S. at 192, 194 n.13. The court below held that where an aggrieved property owner challenges a rezoning in state court, this may extend the period of time in which an otherwise ripe claim may properly be pursued by tolling the applicable statute of limitations.

While another Eleventh Circuit case, *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (styled *Corn III* by the Eleventh Circuit in the instant matter), may arguably have conflated the two separate questions of ripeness and tolling, it is clear after the *New Port Largo* case that the only issue on which the Eleventh Circuit has actually ruled is in the latter. The Court held that "NPL's temporary regulatory taking claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property." After *New Port Largo*, the law in the Eleventh Circuit and elsewhere is that while a landowner may (assuming the other prerequisites are met) begin a section 1983 action without challenging a rezoning in state court, if the landowner does institute such a state court challenge, the federal statute of limitations on the closely related federal constitutional claims may be tolled.

In this, the Eleventh Circuit is in accordance with each and every other circuit that has addressed the question. As correctly pointed out in the concurring opinion of Circuit Judge Edmondson, no case of this Court is in conflict. The Ninth Circuit, of course, in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986) (Kennedy, J.), on facts parallel to *Corn III* and *New Port Largo*, reached the same conclusion. The Sixth Circuit, in *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1987), has also reached a result consistent with the tolling allowed in the Ninth and Eleventh Circuits. The Seventh Circuit, while it has apparently not addressed the exact question at issue here, has cited *Norco* and *Corn III* with approval in the very case which Petitioner claims represents a "conflict." *Biddison v. City of Chicago*, 921 F.2d 724, 727

(7th Cir.), *cert. denied,* 112 S. Ct. 192 (1991). The other cases cited by Petitioner, *Gilbert v. City of Cambridge,* 932 F.2d 51 (1st Cir. 1991) and *Landmark Land Company v. Buchanan,* 874 F.2d 717 (10th Cir. 1989) simply cite *Williamson* without addressing tolling issues or making any criticism whatsoever of either the *Norco* or *Corn III* decisions. In fact, *no* circuit court case has ever made any criticism whatsoever, or identified any conflict, with the rule of law as adopted by the Eleventh Circuit. There is simply no "conflict among the circuits" for this Court to resolve.

Nor is there as a matter of public policy any reason for concern regarding the result reached by the Eleventh and Ninth Circuits and others which have cited *Norco* or *Corn III* with approval. As Circuit Judge Edmondson stated in his concurring opinion:

> As a practical matter, we also want, in taking cases based on local land use regulation, no rule that makes landowners feel that it is risky to use the state courts to do a task for which the state courts are extremely well suited: to determine the validity or invalidity of the land use regulation. The landowners who go into court are neither sleeping on their rights nor lulling local governments into thinking there is no problem. If landowners suspect that the statute of limitations may run on their federal compensation claims while they are in state courts, they might either always ignore the state courts and come directly to federal court, or file in both state and federal court at the outset. Either way, we add to the workload of the federal courts needlessly and probably increase the likelihood that federal

> courts will be interfering in local land use determinations.

*Id.*, 985 F.2d at 1502 (Edmondson, J., specially concurring.) The Petitioner has said nothing to take issue with the wisdom of Judge Edmondson's analysis. The Eleventh Circuit's ruling, like this Court's *Williamson* case, is calculated to encourage the pursuit of land use regulation challenges in state court, a salubrious result by any standard.

The County, in its Point II, attempts to argue that this case might give this Court some basis for addressing hypothetical and fanciful problems not raised by the facts of this case which the County believes may arise when a landowner has sold property before a "final development decision." It strains credulity more than a bit for Monroe County to complain of the plight of landowners who find it difficult to pursue their "legitimate claims for just compensation." Petition at 11. The facts of this case do not in any event raise the issues discussed by Monroe County in its Part II. The holding of the Eleventh Circuit, as stated by that Court, is simply that "NPL's temporary regulatory taking claims were tolled until January 2, 1986, when the state circuit court invalidated the County's rezoning of the subject property." *Id.*, 985 F.2d at 1495. The case is thus a limitations tolling decision; the court did not rule on the issue of whether the action could have been brought earlier. See *Id.*, 985 F.2d at 1499 (Edmondson, J., concurring). The law regarding when a claim may first be pursued (i.e., ripeness) remains as stated in this Court's decision in *Williamson*.

The County asserts that "fact patterns involving the sale of property" will become more frequently raised in taking actions. Petition at 11. If so, then surely this is an argument for treating such issues when they arise in their factual context, rather than hypothetically. They do not arise in this case, where it is uncontradicted that in reality the only "sale" that occurred was a change in the form of ownership between the same beneficial owners, who remained 50-50 partners in the subject property from 1979 through 1986. Appendix 3. Such a transfer cannot, contrary to the County's argument, generate a ripe cause of action where one would otherwise be lacking. Surely, a landowner could not evade the *Williamson* finality requirements by transferring his property to a corporation he himself controlled. Yet this bizarre and facially absurd position is what the County would have this court address. Based on the policies of the just compensation clause, there is no reason to give such transfers as occurred here any significance for taking liability or statute of limitation purposes. Nor would the principles of law that might be relevant to a case of true relinquishment of ownership be informed by a consideration of the facts of this case.

The facts of this case, while crying out in Respondent's mind for a federal damages remedy, are atypical. As recognized by the Eleventh Circuit below, 985 F.2d at 1493-94, Florida law at the time of NPL's challenge expressly did not allow damages for confiscatory zoning. *E.g., Kasser v. Dade County, Florida*, 344 So.2d 928 (Fla.App. 1977) (inverse condemnation cause of action based on zoning did not exist; sole remedy under Florida law is invalidating of zoning as confiscatory);[3] *Corn v. City of Lauderdale Lakes (Corn I)*, 816 F.2d 1514, 1517-19 (11th Cir. 1987) (same). With the later decisions of *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304 (1987) (damages claim for temporary taking exists), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), (no federal claim until state fails to provide just compensation), it is likely that most, if not all, states will allow or require damage claims (i.e., "just compensation" claims) to be pursued in state court. While it is not impossible to imagine valid federal inverse condemnation claims, the barriers and delays endured by NPL in this case are not likely to be often repeated.

## II

## THE JUDGMENT WAS CLEARLY CORRECT FOR ADDITIONAL REASONS

The Eleventh Circuit's opinion resolved the case before it in terms of the tolling effect of the state court zoning challenge which NPL endured from 1980 to 1986. The Eleventh Circuit decision that the section 1983 statute of limitations was tolled during the pendency of the zoning challenge was clearly correct.

Because this ground alone made clear that reversal was required, the court did not choose to reach other equally persuasive bases for reversal. These grounds, however, would defeat Petitioner's statute of limitations defense even absent the *Corn III* reasoning.

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[3] *Kasser*, from the district court of appeal with appellate jurisdiction over Monroe County, would have been the governing precedent in the minds of NPL's attorneys at the time of the state court zoning challenge.

Foremost among these is the "continuing wrong" tolling argument, which was initially argued by plaintiff, and accepted by the district court, and was in proceedings below utilized by Monroe County as well. *See, NPL v. Monroe County*, 985 F.2d at 1492-93. All parties acknowledge that, assuming NPL held continued ownership of the property, the statute of limitations would be tolled at least through mid-1985 (the conclusion of the title litigation) on the "continuing wrong" theory. Much as the statute of limitations for a claim of conspiracy or discrimination does not accrue while wrongful acts pursuant to the conspiracy or discriminatory practice are ongoing, *Gibson v. United States*, 781 F.2d 1334, 1340-41 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) (Section 1983 conspiracy); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (discriminatory practices), the statute of limitations on an inverse condemnation claim does not accrue in the face of new affirmative acts of appropriation. The acts of the County which served as "continuing wrongs" or continuing acts of appropriation, include (1) the title lawsuit filed by Monroe County against NPL in state court arguing that the County was entitled without any payment whatsoever to the 9.65 waterfront acres at issue; (2) still another lawsuit against NPL filed by Monroe County in which it claimed that NPL's purchase and possession of the property represented "unjust enrichment"; (3) aiding and abetting (by testimony and otherwise) the efforts of the airport tenant to resist NPL's eviction of him following the termination of his lease (a course of action which had no valid legal basis whatsoever), (4) accepting rent from the airport tenant at a time when NPL was the record owner and frustrating NPL's efforts to collect rent from the tenant; and (5) manipulating public opinion through dissemination of damaging accusations about NPL's owners to support their rezoning efforts and to thwart NPL's attempt to use its own property.

The County stepped well beyond its typical role in the zoning of private property because its "zoning" and other actions were, transparently, as the County itself admitted in briefing below, a self-interested effort to obtain an additional public airport for the County without having to pay for it. If there were ever a case where application of the "continuing wrong" doctrine to toll the accrual of the statute of limitations is appropriate, it is this case.

Given that all parties are thus in agreement that the County's "continuing wrongs" would have tolled the statute in the absence of the 1982 transfers of title, there is no basis for cutting off the application of that doctrine simply because of the paper transfers. *NPL* (not its transferees) remained the opposing party in the County's lawsuits (the title or constructive trust case, and the unjust enrichment and eviction lawsuits as well) and its owners were the target of the County's efforts to appropriate the property. NPL, under the language of the warranty deeds, possessed the legal duty to its transferees to defend a title challenge such as the County's. Thus, there is nothing in the transfers of title which would logically terminate application of the "continuing wrong" tolling principles. For this additional reason, the result reached by the Eleventh Circuit was clearly correct.

Additional reasons why the statute of limitations never expired on NPL's claims are found in the doctrines of equitable tolling under state law and abstention. Assuming NPL, which was all but bankrupted by the vast array of litigation against the County over the property, could afford yet another lawsuit, no federal court would have entertained it during the pendency of the state law challenge, based upon *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). For instance, a federal court would avoid any possible inconsistency between its own Judgment and those of state courts regarding whether the County or NPL was entitled to title ownership and whether the airport zoning was confiscatory. In those circumstances, plainly the statute of limitations of the federal claims cannot run.

Moreover, under Florida law, whose principles of tolling also apply under *Board of Regents of State University of New York, v. Tomanio*, 446 U.S. 478 (1980), "during the pendency of litigation provoked by defendant's own acts, limitations do not run against plaintiff." *Davis v. Combination Awning & Shelter Co.*, 62 So.2d 742, 744 (Fla. 1955). Florida law also requires tolling to prevent a defendant from profiting by its own wrong. *Machules v. Dept. of Administration*, 523 So.2d 1132 (Fla. 1988); *State ex rel. Hollywood Jockey Club v. Stein*, 183 So.2d 753 (1938).

NPL also argued, in a position noted but not addressed by the Eleventh Circuit below, *see* 985 F.2d 1494 n.13, that the seven-year limitations period of § 95.12, Fla.Stat. (real property actions) or some longer period applied. *See, Marshall v. Kleppe,* 637 F.2d 1217 (9th Cir. 1980); *contra, Bieneman v. City of Chicago,* 864 F.2d 463, 467-70 (7th Cir. 1988), *cert. denied,* 490 U.S. 1080 (1989). NPL would also contend that any reduction in the pertinent limitations period should not be retroactively applied. Under a seven year or longer limitations period, NPL's claims arising directly under the Constitution would be timely.

For any of these reasons, NPL's claim was timely brought in 1987. While the facts of the case are unusual and (one hopes) unlikely to recur, the result reached by the Eleventh Circuit was proper on any number of legal grounds.

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## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX 1

IN THE CIRCUIT COURT OF THE SIXTEENTH
JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN
AND FOR MONROE COUNTY, CIVIL ACTION

MONROE COUNTY, a political subdivision, State of Florida,

Plaintiff,

vs.

NEW PORT LARGO, INC., a Florida corporation,

Defendant,

CASE NO.
82-432-CA-17

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

THIS COURT, after having heard the evidence and considered the weight to be given the testimony of each witness in the light of their demeanor while testifying, their frankness or lack thereof, their interest in the outcome of the case if any, their means and opportunity to know the facts about which they testified, the reasonableness of their testimony in light of all of the evidence in the case, and considering the Citations of authority and argument of counsel for the parties, makes the following findings of fact, conclusions of law and enters the following Final Judgment:

## I. FINDINGS OF FACT.

1. In 1960, Darryle Sheley ("Sheley") acquired certain property referred to as the Port Largo Subdivision

("Subdivision") as trustee for Mr. and Mrs. Stuart Faber ("Faber").

2. In the early 1960s, Sheley began developing the Subdivision.

3. In the course of said development, he dug two canals which provided deep-water access to the Subdivision.

4. Sheley allowed the Monroe County ("County") mosquito control planes to use a portion of his land in the Subdivision, that had been cleared but not yet developed as an air-strip.

5. As the Subdivision developed with houses and electric and phone equipment, the airplanes could not use the Subdivision as an airstrip.

6. In 1967, Sheley and his friend, County Commissioner Harry Harris ("Harris"), began to discuss the possibility of acquiring certain submerged property adjacent to the Subdivision (the "Property") from the Trustees of the Internal Improvement Fund ("Trustees") to construct an airstrip so that the Monroe County ("County") mosquito control planes could have an Upper Keys landing site.

7. Sheley and Harris tentatively agreed that if Sheley, the abutting upland owner of the "Property", acquired the Property he would at some future date donate it to the County in consideration for the County's construction of a breakwater and north-south canal for the Subdivision. The breakwater and canal were to be built on some submerged land owned by Sheley and the "Property" to be obtained from the "Trustees".

8. In accordance with this plan, Sheley, through Jim Glass ("Glass") who also served as Monroe County Engineer, applied to the Trustees for title to the Property.

9. Jim Glass had no authority to encumber or convey the Property on behalf of Sheley.

10. After several delays by the "Trustees", and several revisions of the application, including revision of the bulkhead line so that it would not extend beyond the rights of the adjacent property owners and revising the price per acre from $300.00 to $414.15. The Trustees sold the "Property" to Sheley by Deed which contained no restrictions or reservations as to the Properties use.

11. The County learned through its consultant, that it could not obtain funds for the breakwater and canal, and the County abandoned the plan.

12. The County communicated its abandonment of the plan to Sheley, through Harold Wilde ("Wilde"), its airport consultant.

13. Sheley, under his plan with the County, intended to construct a 100-foot-wide airstrip; however, after the County abandoned the plan, Sheley spent more than $400,000.00 to construct a 150-foot-wide breakwater, which included a row of residential lots and a street.

14. Sheley paved the street which has become used as the landing strip.

15. In 1970, Sheley's trust expired and Kenneth Bassett ("Bassett") became trustee.

16. Sheley continued to develop and manage the Property under a power of attorney from Bassett.

17. In 1972, the County, pursuant to Sheley's request, platted the Property into residential lots and zoned the Property for residential duplexes.

18. Also in connection with the platting, the County accepted Sheley's deed to certain lots which they now claim, as a bond to assure completion of Subdivision improvements.

19. Upon completion of the Subdivision improvements, the County returned the deed to the lots to Sheley without making any demands for dedication of the Property to the County as an airstrip.

20. The County has collected taxes and levied solid waste assessments on the Property as residential lots and not as an airstrip.

21. New Port Largo, Inc., a Florida corporation ("New Port Largo"), acquired the Property from Bassett in September, 1979.

22. Although Charles Netter ("Netter"), an attorney, one of the principals of New Port Largo, was advised that the County had a claim against the Property, he checked the title to the Property, including the abstract, the Trustees deed, the platting, the taxes and assessments and the zoning and determined that title was vested in Bassett.

23. Stuart Marr ("Marr"), who is now the other principal of New Port Largo, acquired an interest in the corporation some time after the original contract for purchase of the Property and before the closing.

24. Marr had, more than a year prior to becoming a principal in New Port Largo, been involved as the broker

on behalf of Mr. and Mrs. Joseph L. Sharit in the sale of their Subdivision lot to Mr. and Mrs. Gerald Recob.

25. During the course of that closing, Marr had heard about the County's claim; however, he had not studied Sharit's documents and did not know of the substance or details of the claim.

26. New Port Largo paid valuable consideration, to-wit, more than Two Million Dollars ($2,000,000.00) for the Property.

## II. CONCLUSION OF LAW

1. The County has failed to establish an express trust for the Property.

2. As with any contract, for a promise to donate land in the future to be binding, there must be some legal consideration passed. The Third DCA addressed this issue in *Kaufman v. Harder,* 354 So. 2d 109 (3d DCA, 1978). That case stands for the proposition that there can be no indebtedness without legal consideration; and that a mere gratuitous promise of a future gift, lacking consideration, is unenforceable as a nudum pactum.

The consideration needed to make such an agreement binding would be either some benefit to the promisor/landowner or a detriment to the promisee/county. In the case at bar, the landowner has received no benefit as a result of his alleged promise to the county, because he bought the land from a Third Party, the State, in a transaction that is separate from his alleged promise to the County. Neither has there been a detriment to the promisee/County, because they have not paid any money or any other consideration in return for the alleged promise. Thus, applied to the *Kaufman* case, consideration is lacking, and the landowner's gratuitous promise can not be enforced.

Failure to carry out a promise cannot in itself give rise to a constructive trust. Consideration must be passed between the parties for such a trust to be found. *Leeper v. Gorman,* 128 So. 876 (Fla. 1930). As seems to be established by the facts of the present case, the landowner received no consideration in exchange for his alleged promise.

More recently, the 3rd DCA, in *Yawn v. Blackwell,* 343 So.2d 906 (3rd DCA, 1977) found that for a constructive trust to be imposed there must exist a situation between parties involving fraud, undue influence, abuse of confidence or mistake. To enforce a constructive trust in the case at bar, under the requisites of *Yawn,* the Court would have to find that a fraudulent representation by the landowner to the County was the actual cause of the State's sale of the land to said landowner. Such does not appear to be the case, as the sale by the State was not conditioned by any such future donation of land to the County.

When weighing the evidence of the existence of consideration, or of any fraud or mistake to prove constructive trusts, the standard as set by the 3rd DCA is that of "clear and convincing" evidence. *Hiestand v. Geier,* 396 So. 2d 744 (3DCA, 1981).

3. The County has failed to establish fraud, breach of fiduciary duty or any other inequity by Sheley or his successors.

4. The County has failed to prove that any enforceable contract to convey the Property existed between Sheley and the County for the Property.

5. The County has failed to establish the basis for imposition of a constructive trust.

6. Even if the County had produced clear and convincing evidence sufficient to establish a constructive trust, and it has not, the County, by platting, accepting and returning deeds, taxing and assessing the Property is equitably estopped to claim the Property from New Port Largo.

7. The County, which is a political subdivision of the State of Florida, is legally estopped to claim any right in the Property or any limitation on the use of the Property because it is bound by the unrestricted deed from the Trustees to Sheley.

8. The County, which delayed almost 14 years to assert a claim to the Property, is barred from relief under the doctrine of laches.

9. New Port Largo is a bona fide purchaser for value of the Property.

10. Since the rights of an innocent third party bona fide purchaser for value have intervened, the County cannot divest New Port Largo of title to the Property.

IT IS THEREUPON ORDERED AND ADJUDGED AS FOLLOWS:

1. The final judgment is in favor of Defendant, NEW PORT LARGO, INC., and against the Plaintiff,

MONROE COUNTY, a political subdivision of the State of Florida.

2. The County shall take nothing by this action and shall go forth hence without day.

3. The Court reserves jurisdiction to tax costs on behalf of New Port Largo and against Monroe County.

DONE AND ORDERED in Chambers, at Monroe County, State of Florida this 27 day of March, 1984.

/s/ Francis X. Knuck
FRANCIS X. KNUCK,
Circuit Judge

Copies to:

Walter S. Kyle, Esq.
Lucien C. Proby, Jr., Esq.
Joseph B. Allen, III, Esq.
Charles Netter, Esq.
Joe Creely, Esq.
Joe Sharit, Jr., Esq.
Mallory H. Horton, Esq.
Marsha G. Rydberg, Esq.

# APPENDIX 2

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY, CIVIL ACTION

| | | |
|---|---|---|
| NEW PORT LARGO, INC. A Florida Corporation,<br>Plaintiff,<br>vs.<br>DON SCHLOSSER, CURTIS BLAIR GERALD HERNANDEZ, JR., RICHARD KERR, and GEROGE DOLEZAL as the Board of Commissioners of Monroe County, Florida, and MONROE COUNTY, FLORIDA, a political subdivision of the State of Florida,<br>Defendants. | ) | CASE NO. 80-1164-CA-17 |

## FINAL SUMMARY JUDGMENT

This cause came on to be heard on the Motion for Summary Judgment of plaintiff, and the court hearing considered the argument of counsel for the respective parties and the evidence of record, finds as follows:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. The subject property compris[es] more than five acres and the rezoning application is therefore a major development and subject to the procedures of the Major Development Project Ordinance (Chapter 6, Article VII, Monroe County Ordinances).

3. Ordinance No. 14-1979, enacted by defendant, Monroe County, on June 5, 1979, establishes a zoning district

classification of private airport defining same in accordance with the definition of private airport in Chapter 333.01, Florida Administrative Code. The only permitted use in said zoning district is a private airport.

4. The airport located on the subject property, operated by a lessee, was a public airport. The subject property does not qualify by dimensions to meet the requirements as a public airport or a private airport.

5. Monroe County did not comply with the requirements of the Major Development Product Ordinance in the rezoning.

6. During the year 1982 Monroe County filed suit to establish ownership of the subject property, Case No. 82-432-CA-17, Monroe County Circuit Court. In 1984, the Circuit Court denied the claim of the County, declaring the property to be owned by plaintiff. The decision was affirmed in Monroe County v. New Port Largo, Inc., 467 So.2d 757 (Fla. 3d DCA 1985). This rezoning of this property, now determined to be private, to airport, would deprive the owner of any reasonable use. However, the Court finds that the county attempted the rezoning in good faith inasmuch as it had an arguable claim at the time of filing the application for rezoning.

Therefore, it is Ordered and Adjudged as follows:

> A. The attempted rezoning of the subject property to Private Airport is invalid and Resolution No. 234-1980 is hereby quashed and said resolution is declared to be of no force and effect.
>
> B. That final summary judgment is hereby entered in favor of plaintiff.

C. Costs of this action shall be taxed at a subsequent hearing.

DONE AND ORD[E]RED in Chambers, Monroe County Courthouse, Key West, Florida, this 2nd day of January, 1986.

/s/ M. Ignatius Lester
Circuit Judge

Conformed Copies Furnished To:

JOSEPH B. ALLEN, III, ESQ.
LUCIAN C. PROBY, Jr., ESQ.

COPIES OF THE ABOVE FINAL SUMMARY JUDGMENT WERE HANDED OR MAILED TO ATTORNEYS OF RECORD

ON 1/2/86

BY /s/ E. Gato

# APPENDIX 3

## ASSIGNMENT

Stuart D. Marr, and Charles H. Netter, individually and TFW, Inc. and First National Bank of South Miami, as Trustee for Marr Land Trust 741 ("Assignors") and each of them, do hereby irrevocably assign to New Port Largo, Inc., a Florida corporation ("Assignee"), any and all claims, demands, and causes of action, if any, which each has or may have against Monroe County, a political subdivision of the State of Florida, arising out of or on account of the activities of Monroe County as alleged in Case No. 87-10043-CIV-KING, entitled *New Port Largo, Inc. v. Monroe County.*

Assignors each ratify commencement and prosecution of the action by New Port Largo, Inc. Assignors acknowledge that each is abandoning dominion and control over all rights assigned, but that, nonetheless, each will be bound, by res judicata and otherwise, by the results of the lawsuit obtained, whether at trial or by settlement, by New Port Largo, Inc., without prejudice to any rights to appeal.

Assignee for its part accepts the assignments and agrees to prosecute the action diligently and to assert all claims arising out of the pending complaint in the above-cited lawsuit, whether the claim was originally the claim of it or any assignor.

All parties agree that any net proceeds of the lawsuit shall be divided between the shareholders of assignee in the proportion of his ownership of assignee.

ASSIGNORS:

/s/ Stuart D. Marr,
Stuart D. Marr,
Individually

Before me appeared Stuart D. Marr, known to me to be the above individual who signed the above in my presence on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 5, 1990
BONDED THRU GENERAL INS. UND.

FIRST NATIONAL BANK OF
SOUTH MIAMI, as Trustee for
MARR LAND TRUST LT #741

By: /s/ John J. Murphy
JOHN J. MURPHY
VICE PRESIDENT
SR. TRUST OFFICER
as Trustee

Before me appeared John J. Murphy, known to me to be the above individual, who signed the above in my presence in the noted capacity, on this 24th day of July 1989, 1989.

/s/ Illegible
Notary Public

My Commission Expires
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. JAN 25, 1992
BONDED THRU GENERAL INS. UND.

TFW, INC.

By: /s/ Charles H. Netter,
Charles H. Netter,
Individually

BY: /s/ Charles H. Netter
Charles H. Netter, as
as President of T.F.W.,
Inc., a Florida corporation

Before me appeared Charles H. Netter, known to me to be the above individual, who signed the above in my presence in the noted capacity on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 5, 1990
BONDED THRU GENERAL INS. UND.

ASSIGNEE:

NEW PORT LARGO, INC.

BY: /s/ Stuart D. Marr
Stuart D. Marr,
President

BY: /s/ Charles H. Netter
Charles H. Netter,
Secretary Treasurer

Before me appeared Charles H. Netter and Stuart Marr known to me to be the above individuals, who signed the above in my presence in the noted capacities, on this 24th day of July, 1989.

/s/ Illegible
Notary Public

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT. 9, 1990
BONDED THRU GENERAL INS. UND.